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Executive Committee

1949 - 1950

At a meeting of the Board of Delegates of the Massachusetts Bar Association held on October 7, 1949 the following persons were chosen to serve on the Executive Committee for one year, in addition to the President, Treasurer, Secretary and Assistant Secretary *ex officiis:*

Fletcher Clark, Jr., *Middleboro;*
Reuben Hall, *Newton*
Thomas M. A. Higgins, *Lowell*
Fredric S. O'Brien, *Lawrence*
Hon. Philip O'Brien, *Holyoke*
Ines DiPersio, *Belmont*
Francis J. Quirico, *Pittsfield*

Massachusetts Law Quarterly

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New Statutes

The circular letter of the Administrative Committee of the district courts of September 15, 1949 contains a list (covering four pages) of new statutes of a varied character. That letter will appear as an appendix to the 25th Report of the Judicial Council which will be reprinted in the next issue of this "Quarterly" as the December number.

We called attention to some new statutes in the July number (pp. 25-30). A few others are:

Chapter 427 relative to death and injuries resulting in death.

Section 11: "This act shall take effect on January first (1950) and shall apply only to deaths resulting from injuries or accidents occurring on or after said date, provided that the provisions of this section shall not affect any right of action which accrued prior to the effective date of this act."

Legislation in recent years has juggled the subject of liability for death first in one direction and then in another with confusing results for the bar in practice and for the judges in charging juries. There was no civil liability for damages for death at common law. It was first provided for in England by what was known as Lord Campbell's act in the middle of the 19th century. Prior to 1946 the Massachusetts law provided that damages should be "assessed with reference to the degree of culpability of the defendant."

The act of 1946 (chap. 614), passed in a hurry about midnight on the last day of the session, added to that clause the words "and with reference to the pecuniary loss sustained by the parties entitled to benefit hereunder". This made two concurrent and consequently vague and confusing standards of damages.

The act of 1947 (chap. 506) cut out the clause relating to "the degree of culpability".

The new act of 1949 omits the clause about "pecuniary loss sustained by the parties entitled to benefit" and restores the "degree of culpability" as the sole measure of damages thus restoring the original penal character of the statute.

The minimum of $2,000 and maximum of $15,000 are not changed. The two year statute of limitations is not changed and see as to notice within sixty days, sections 2C and 9.

Prior to the legislation of 1946 a special commission had been appointed and its report (Senate 430 of 1943) contained a tabulated statement and summaries of the death statutes in all the states. The recommendations of that commission for a compensatory statute were not followed, but the report deserves study in connection with the legislative hisory.

Chapter 792 extending the inheritance tax to survivorship in tenancy by the entirety. This act amends Gen. Laws chap. 65 as amended by St. 1941 chap. 605 and contains the following proviso:

"Provided, however, that in the case of any beneficial interest arising or accruing by survivorship of a husband or wife in a tenancy by the entirety in single family residential property occupied by such husband and wife as a domicile, there shall be allowed an exemption of such property to the extent of its value, and in multiple family residential property so occupied there shall be allowed an exemption of such property to the extent of twenty-five thousand dollars of its value."

Approved August 29, 1949.

The act takes effect *after ninety days* from August 29.

Chapter 654 as to publication of rules of the Supreme Judicial and Superior Courts. This act provides printing of rules and "such notes and annotations, if any, as shall be directed by the justices" and their sale through the offices of the clerks of court.

Summary of Replies about Equity Rules

The suggested rules as to appellate procedure were printed in the "Quarterly" for April and the "Bar Bulletin" for May. Post card notices were mailed by the Massachusetts Bar Association and the Boston Bar Association to all their members with reply cards. The cards recorded during the summer, with all duplications eliminated, are as follows:

Favoring adoption of the proposed rules	582
Favoring in part, not favoring in part	6
Not favoring adoption	19

There appears no discernible difference in the ratio of approval to disapproval either as between lawyers in large cities and those in small communities, or between older and younger members of the bar.

A considerable number of lawyers sent in their specific comments by letter or on their cards. Many of them dealt with one or more details of the rules where improvements were suggested. The largest number of particular criticisms were directed to the provisions of proposed Rule XIII relating the filing of briefs to the date when the case is entered. These criticisms were cogent and from lawyers of broad experience. The helpful suggestions received are under consideration.

Federal Tax Institute of New England, Inc.

The Federal Tax Institute of New England will hold its second forum from 9:45 a.m. to 5:00 p.m., on Saturday, December 10, 1949, at the Statler Hotel in Boston. The subject will be "Tax Planning for Business."

Erwin N. Griswold, Dean of Harvard Law School and President of the Institute, will preside as Chairman. The panel of speakers will include representatives from the Treasury Department in Washington, Professor Warren of Columbia University and well-known tax attorneys.

It is also intended to make registration blanks available in a conspicuous place in the lounge of the Boston Bar Association, about a month before the date of the forum. The fee of $7.50 will include luncheon at the Statler. On receipt of each registration blank, the Institute will send admission tickets to the registrant. Since seating capacity is limited, and previous forums have been oversubscribed, tickets will be issued in order of registration to as many registrants as can be comfortably accommodated.

Removal of Cases to the Federal Court under the Revised Federal Code

By William B. Sleigh, Jr.

The revision of the Judicial Code (Title 28, U.S.C.) in June, 1948, was in many respects an admirable achievement, but as is often the case in such substantial and complicated undertakings some errors were made and further amendment became necessary. One of these concerned the removal procedure (see the July 1949 issue of the Quarterly, p. 28).

It is disappointing to find that this corrective amendment (H.R. 3762—approved May 24, 1949, sec. 83 (a)—Public Law 72, 81st Congress) amending the Judicial Code, 28 U.S.C. sec. 1446 (b) still seems to leave us (in Massachusetts, at least) with a removal procedure which is bristling with pitfalls and ambiguities.

As the section now reads:

> "(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter."

The section presents two alternatives; the second, while applicable in equity cases under our practice is obviously not applicable in the usual contract or tort action commenced by a trustee writ or a common writ and summons. In such cases, we must apply the first alternative. Undoubtedly the "initial pleading" refers to what we choose to call the "declaration". The twenty days is to be computed from the "receipt by the defendant, through service or otherwise", of a copy of the declaration.

Under our practice there is, of course, no requirement in such actions that a copy of the declaration be served on the defendant (G.L. c.231, sec. 11) unless in some cases (G.L. c.231, sec. 12) de-

mand is made, and in the absence of such a demand, even defendant's counsel may never actually receive a copy of the declaration. He will usually examine and perhaps copy the original declaration filed in court when the case is entered.

How then is the new removal procedure to be applied in such cases?

Does filing in court by the plaintiff constitute "receipt by the defendant" so that the time runs from the entry of the case? Does mailing a copy to counsel or receipt by counsel of a copy, constitute receipt "by the defendant"? Does examination by defendant's counsel of the original declaration on file in court constitute "receipt by the defendant . . . . of a copy"? Or suppose defendant's counsel being fully aware of the nature of the case files his answer without having requested or even seen a copy of the declaration. When does the time commence to run in such a case? Suppose that several months having gone by, he decides that it would be advisable to remove the case. May he then request or demand (in an appropriate case under G.L. c.231, sec. 12) a copy of the declaration and, within twenty days after receiving the same, remove the case?

It is to be regretted that the draftsmen of the amendatory act (which we understand was inspired at least in part by members of the Massachusetts bar) did not submit a draft of the proposed legislation to our Judicial Council or to some committee of our bar for examination and suggestion before passage. The perplexing questions raised above could readily have been eliminated if the provision had included as an alternative to the "receipt" of a copy by the defendant, the filing of the initial pleading in court with notice to the defendant of such filing by previous service of process or otherwise.

The suggestion has been made that the General Laws be amended to require that in any action at law commenced by writ against a non-resident, a copy of the declaration shall be annexed to the copy of the writ served upon the defendant. But this is only a partial remedy for there are cases where diversity of citizenship is not a jurisdictional necessity and the right to remove exists in such instances even though both parties may be residents of Massachusetts. See, for example, 28 U.S.C. sections 1331, 1338 (b), 1357. It

is submitted that the only sensible remedy is by way of a further amendment of the act by Congress.

A plaintiff's attorney in an action of contract or tort commenced by common writ and summons or by trustee process would do well to make it a practice promptly to serve a copy of the declaration on the defendant in any case which might be removable and thus start the time running so as to avoid the ambiguities of the statute. By the same token, a defendant's attorney to be on the safe side in such a case will commence his removal proceeding within twenty days after the case is entered in court even though he has not received a copy of the declaration.

Note

The draft suggested by members of the Massachusetts delegation to the Committee on Jurisprudence and Law Reform, approved by that committee and passed by the House of Delegates of the A.B.A. appears on p. 255 of the ABA Journal for March, 1949, as follows:

> "Mr. Armstrong then moved adoption of the following resolution:
>
> "RESOLVED, That the American Bar Association approves the submission to the Congress of an amendment to Section 1446, sub-section (b) of the Act entitled '28 United States Code, Judiciary and Judicial Power'; said amendment to be as follows: That, following the words 'service of process' and preceding the words 'whichever is later' the words 'or the filing of declaration or complaint in the state court' be added to such section and sub-section.
>
> "FURTHER RESOLVED, That the Standing Committee on Jurisprudence and Law Reform is authorized to initiate and support such amendment in the Congress by all appropriate means at its command.
>
> "This resolution was passed as the action of the House."

That draft, if it had been followed, would have fixed the date as that suggested in Mr. Sleigh's last sentence. While it was printed in the March "Journal" two months before the new act of Congress was adopted in May it is to be regretted, as Mr. Sleigh suggests,

that special attention was not called to it more generally in Massachusetts.

The phraseology of the new act discussed by Mr. Sleigh was adopted doubtless with a view to covering varied practices in different states. The safe course is that suggested by Mr. Sleigh which is in accordance with the draft suggested by the Massachusetts delegates. F.W.G.

Equitable Enforcement of Foreign Alimony and Support Orders*

Brief, Prepared by the National Association of Legal Aid Organizations, in Support of the Practice, for the Consideration of the Profession

STATEMENT OF FACTS

This Brief arises from a situation which is becoming increasingly acute with the increased mobility of our population. Frequently individuals—usually husbands or fathers, still married or divorced—who are under court orders for the support of dependents seek relief from their legal obligations by crossing state lines. Having left the state of marital domicile, they forget about the obligations they have left behind. More often than not, the deserted dependents are without *effective* remedy to compel compliance with the court orders which are being ignored.

This is a growing evil which is leading some to demand Federal legislation. If such legislation is to be avoided, state courts will have to exercise their legitimate powers to the fullest extent required to curb a national evil which is assuming dangerous proportions. This Brief was written in the hope that it might encourage courts to exercise these powers by granting equitable enforcement of alimony and support orders of sister states.

QUESTIONS AT ISSUE

I. Is the remedy at law adequate to enforce foreign alimony and support orders?

II. Is extradition an effective remedy to enforce an alimony and support order?

---

* An article on a nation-wide movement for a reciprocal interstate statutory plan appeared in the "Woman's Home Companion" for September 1949. Statutes were adopted in several states in 1949.

III. Are the courts of one state required, under the "full faith and credit" clause, to grant equitable enforcement to orders of other states for alimony and support?

IV. Should sound public policy and reasons of comity lead the states to go beyond the bare requirements of the "full faith and credit" clause in granting equitable enforcement to alimony decrees and support orders of other states?

ARGUMENT

I. Is the remedy at law adequate to enforce foreign alimony and support orders?

In spite of the fact that a few jurisdictions have held that the remedy at law is adequate, it is submitted that the contrary is emphatically the case. The reasons for this inadequacy are as follows:

1. The only available remedy at law is execution after first reducing the amount of default on a foreign order to a judgment; and to execute there must be assets. Very many defendants have absolutely no assets whatsoever upon which execution can be had. Furthermore, it is a simple matter to secrete one's assets, or to acquire future assets in the names of trusted friends. Oftentimes when the defendant has married a new spouse everything acquired will be held in joint ownership, which would defeat efforts to execute on a judgment.

2. Even if there are assets subject to execution, the tremendous amount of time which can, and often does elapse between the filing of suit and the entry of judgment, and then until the execution sale occurs, is an added, and unnecessary hardship upon the dependents who are in need of the necessaries of life.

3. Moreover, at law there is no automatic periodic revival. In other words, as each unpaid installment of the order becomes due and is in arrears, an entirely new suit must be instituted and followed to completion. The costs to the plaintiff under this system would very often wipe out any benefits coming to the dependent.

4. And finally, that the remedy at law is inadequate is evident from the fact that it is seldom used in support cases when the de-

fendant is in his home state. If the remedy at law were adequate, there would need be no punishment for contempt for non-compliance with a support order when there was no leaving of the state. If equitable enforcement is needed at home, it is all the more necessary in a foreign state.

II. Is extradition an effective remedy to enforce an alimony and support order?

It is submitted that extradition is an impractical remedy, for the following reasons:

1. The costs of extradition run high and few states can afford to bear this expense. Therefore, the costs of extradition usually fall entirely or in part upon the needy dependents, who can seldom raise the amounts required. This in turn makes of state boundaries, walls of protection to the absconding spouse or parent.

2. Extradition, when accomplished, serves to uproot the defendant from the community in which he has established himself. The income from the employment he has acquired in the new community should be used to support his family back home. If extradited to the old community, this income is usually lost with the loss of employment.

3. Also, when extradition is accomplished, it brings the defendant back into a community where he has no employment and no desire to reside. This will only increase his resentment towards his family.

4. There is also the very real possibility that it will work an unjust hardship on any subsequently acquired spouse or children in the new community.

5. Finally, if the defendant is incarcerated, he will be of no use to anyone as a breadwinner, but an unnecessary liability upon the deserted state.

III. Are the courts of one state required, under the "full faith and credit" clause, to grant equitable enforcement to orders of other states for alimony and support?

It is submitted that if the decree or order meets certain necessary requisites, the courts are so required to do. Notwithstanding the fact that these necessary requisites are often lacking in support

orders, there is, nevertheless, no bar to granting such relief, unless the bar be of purely local creation, statutory or otherwise.

In *Pennington vs. Gibson,* 16 How. 65, the United States Supreme Court placed equity decrees on a par with money judgments and as a result "full faith" attaches to such a decree, if it is (a) final, (b) certain in amount, (c) unconditional, (d) not vacated, and (e) execution has not been superseded in the state which rendered it. (Restatement of Conflict of Laws, Section 434c and 2 Beale, Conflict of Laws, page 1381.)

The first important case dealing with the question of alimony enforcement is *Barber vs. Barber,* 21 How. 582. This case is well known for having established that an alimony decree, payable in installments, is a debt of record and as such entitled to "full faith and credit" by sister states, until the decree is recalled or modified, even though it is subject to being recalled. As to the accrued installments, it *must* be enforced in the sister state.

The second case of importance is that of *Lynde vs. Lynde,* 181 U. S. 183, placing a limitation on the *Barber* case (supra) in holding that where the alimony decree in the original forum was subject to alteration and modification, it was not final and thus not within the "full faith" clause. The Court pointed out that in such a situation the wife must first obtain a decree from the original forum adjudging the installments accrued and unpaid. On such a decree from the court of the original award, an action could then be maintained in the sister state. The *Lynde* case thus tended to discourage the use of equitable remedies in enforcing alimony decrees by not giving force to the statement in the *Barber* case, viz:

> "* * * the court having jurisdiction, [the decree] will be carried to judgment in any other state, *to have there the same binding force that it has in the State in which it was originally given.* For such a purpose, both the equity courts of the United States and the same courts of the States have jurisdiction." (Italics ours.) (Supra, page 591.)

Alimony decrees generally can be enforced by equitable remedies in the forum where rendered and, therefore, had the opinion in the *Barber* case been followed, the use of equitable remedies could well have been made available at an early date.

In spite of the *Lynde* decision, some courts, in order to give full

force to alimony awards, assumed, in the absence of express proof to the contrary, that the award of the original forum was final in regard to accrued and unpaid installments. (Professor Jacobs in 6 Law and Contemporary Problems, at page 258, cites *Wagner* v. *Wagner*, 26 R. I. 27.)

The third leading case on this matter is that of *Sistare v. Sistare*, 218 U. S. 1, holding that if the forum awarding alimony can modify, alter or annul, even as to the accrued installments, the second tribunal need not allow recovery thereon. The *Sistare* case interprets the *Barber* and *Lynde* holdings as in harmony with each other, and further sets forth a rule of construction to the effect that there must be clear and convincing language before it can be implied that the power to vary and modify the award exists. The Court said:

> "* * *, we think the conclusion is inevitable that the Lynde case cannot be held to overrule the Barber case and therefore that the two cases must be interpreted in harmony, one with the other, and that on so doing it results: First, that generally speaking where a decree is rendered for alimony and is made payable in future installments the right to such installments become absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the Barber case, 'alimony decree to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled as any other judgment for money is.' Second, that this general rule, however, does not obtain where by the law of the State in which a judgment for future alimony is rendered the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due." (*Sistare v. Sistare*, supra.)

This case, therefore, makes it important to determine the power of altering, modifying or vacating the decree of alimony in the

state of the original award, since the existence of such power becomes the determining factor in deciding whether the alimony decree calling for installment payments must be enforced in the sister state. Some of the states, therefore, require the plaintiff to allege and prove that the decree in the original state as to accrued installments is not subject to modification. Other courts throw the burden upon the defendant, presuming that the original award is final. It is submitted that this latter view is preferable since the defendant is generally trying to escape compliance with the alimony decree as originally granted. This view is predicated upon the policy that every effort should be made in the sister state to enforce alimony decrees.

The law of construction laid down in the *Sistare* case to the effect that "no retroactive effect should be given to the exercise of any power to recast a decree unless the language defining the power leaves no choice", is followed by most of the states.

It is, therefore, evident that the Supreme Court in its decisions manifests a desire to enforce installment payments of alimony whenever possible, but it is constrained to follow the patterns laid down for the enforcement of foreign money judgments generally.

Nevertheless, it is significant to remember that when the scope of the "full faith and credit" clause is not adequate to *require* equitable enforcement by a sister state, it in no way *precludes* such enforcement. When it does not *require*, it certainly does not *prohibit*. The only barrier which can exist against equitable enforcement, when not required by the federal constitution, must be of local, that is, state creation.

It is, therefore, encouraging to note that a growing number of states are recognizing the peculiar character of alimony and support orders. They are recognizing that *public policy* requires, even when "full faith" may not, the equitable enforcement of such decrees and orders.

IV. Should sound public policy and reasons of comity lead the states to go beyond the bare requirements of the "full faith and credit" clause in granting equitable enforcement to alimony decrees and support orders of other states?

It is submitted that both for reasons of public policy and comity the states should go beyond the constitutional requirements in

granting equitable enforcement to support orders. And it is further submitted that this is the modern trend.

Mississippi was the first state to follow the ruling in *Barber v. Barber* (supra) and recognize the social need of enforcing foreign decrees and orders for support with equitable remedies. In *Fanchier v. Gammill* (1927), 148 Miss. 723, at page 737, the court said:

> "It is our view that, on account of the character of a judgment for alimony, which rests to some extent upon public policy, in requiring a husband to support his wife and children due to the sacred human relationship, and that they may not become public charges and derelicts, the decree for alimony with the extraordinary power of enforcement by attachment and contempt proceedings should be established and enforced by our equity court which has full and sole jurisdiction of all matters of divorce and alimony; because to hold that a foreign judgment for alimony can be enforced in this state only by execution, the same as judgments at law, would be to impair or to deprive a foreign judgment for alimony of its inherent power of enforcement by attachment and contempt proceedings. Thus, as we view it, to so hold would be to disregard the 'full faith and credit' clause of the federal law, which we interpret to mean that the judgment, with its peculiar right of enforcement, as one for alimony, should be established and enforced by the equity courts of our state *in the same manner, and to the same extent,* as it could have been enforced by our court if originally obtained in our state." (Italics ours.)

In 1929 California in the case of *Cummings v. Cummings*, 97 Cal. App. 144, gave judgment for a sum equal to the amount due under a New York decree and for the weekly installments accruing thereafter, until such time as the New York decree might be modified. Leave was granted to apply for modification, if the New York court modified its decree. See also: *Creager v. Superior Court* (1932), 126 Cal. App. 280; *Burton v. Tearle* (1936), 7 Cal. 2nd 48; *Palen v. Palen*, 12 Cal. App. 2nd 357; *Biewend v. Biewend* (1941), 109 Pac. 2nd 701.

Minnesota has applied to a South Dakota alimony and support order its own statute granting equitable remedies for the enforcement of local alimony and support orders. The court gave as its

reason that comity between states and the public policy of the State of Minnesota required such interpretation of the Minnesota statute, irrespective of whether the "full faith and credit" clause of the federal constitution applied. (*Ostrander v. Ostrander* (1934), 190 Minn. 547.) See also *Holten v. Holten* (1922), 153 Minn. 346, where the court said:

> "It would be a reproach to our system of legal administration if one could escape from the operation of a judicial decree by going into another state."

In *Shibley v. Shibley* (1935), 181 Wash. 166, the Court held the plaintiff was entitled to equitable enforcement of a California judgment and the Court explained its decision in the following language:

> "We adopt this procedure not on account of the rule of comity enjoyed by the full faith and credit clause of the Federal Constitution, but because as a matter of public concern and equitable power the enforcement in this State of such decrees for alimony and support money should not depend solely upon ordinary execution."

In *Cousineau v. Cousineau* (1936), 155 Oregon 184, the defendant appealed on the ground that an order for alimony or support in a divorce proceeding in California was subject to modification and, therefore, was not a final decree; that the court had no jurisdiction except to render a judgment for the amount in arrears. The Oregon court held that all installments for alimony due under a decree for divorce are final decrees. The Court was held entitled to enforce payments in the same manner as the California court and entitled to give the plaintiff whatever equitable remedies are available to enforce such decrees.

Connecticut has held that the right to enforce equitably a New York decree exists even though no statutory authority exists for such proceedings. *German v. German* (1936), 122 Conn. 155.

In *Johnson v. Johnson* (1940), 194 S. C. 115, South Carolina held that a Florida decree should be treated as final with reference to accrued and past due installments and should be enforced by the same remedies as are applicable to domestic decrees for alimony.

In a recent case, *Rule vs. Rule* (1942), 313 Ill. App. 108, Illinois enforced a decree of Nevada by equitable remedies because of

judicial determination and not because of any statutory provisions. The court held that since it is as urgent that the obligation of a husband to support his wife and child be enforced in one state as another, it should be enforced by the same remedies as are applicable to domestic decrees. The court found the arrearage due and then ordered defendant to continue weekly payments according to the Nevada decree until the children should reach their majority. The defendant was assured that the Illinois court would subsequently recognize any modification of the decree which the Nevada court might make. See also: *Miller v. Miller* (1940), 186 Okla. 566; and *Matson v. Matson* (1919), 186 Iowa 607.

A plaintiff brought a Georgia decree for alimony to a Florida equity court, claiming the defendant had no assets subject to execution in Florida, but that he did have substantially remunerative employment in Florida. The chancellor refused to entertain the cause and transferred it to the law docket. The appellate tribunal in *McDuffie v. McDuffie* (1944), 155 Fla. 63, held that regardless of the scope of the "full faith and credit" clause, the chancellor should assume jurisdiction and enforce the decree with equitable remedies. The Court said that the doctrine enunciated by Mississippi in *Fanchier v. Gammill* (supra) was the law of Florida.

The most recent state to follow this growing modern trend appears to be Virginia. In *McKeel v. McKeel* (1946), 185 Va. 108, a Florida decree requiring the payment of alimony and support of child was held to be final, even though it contained a reservation as to modification, which reservation under Florida rulings would be applicable only to future installments. The Court said:

> "But even though the courts of Virginia may not be compelled to do so under the full faith and credit clause of the Federal Constitution, upon principles of comity they may establish as their own decree a foreign decree for future payments of alimony, with the same force and effect as if it had been entered in Virginia, provided of course, the foreign decree violates no public policy of Virginia."

The Court held further that the husband's duty to support his wife, is not merely contractual, but is one in which the public has a vital interest. The public policy of Virginia demands that his obligation be performed as fully as if it had been incurred there in the first

place. See also: *Weldy v. Weldy* (1945), 20 N. W. 2nd 583 (North Dakota).

It is submitted that the growing list of states, now including California, Connecticut, Florida, Illinois, Minnesota, Mississippi, Oklahoma, Oregon, South Carolina, Virginia and Washington, which for reasons of comity and public policy grant equitable enforcement are meeting a national problem with realistic vision. There are literally thousands of husbands and fathers shirking their moral and legal responsibilities for supporting their families by "leaving the state." If these men knew, before they "left the state", that no matter where they decided to take up residence, that state could and would punish them for failure to support their dependents to the same extent as the one from whence they came, many would remain where they were and abide by their support orders.

The underlying assumption of this Brief has been that alimony and maintenance are debts, but that they are more than ordinary debts. They are debts in which the entire community has an interest. They grow out of an especially sacred social relationship controlled by the community. Moreover, if these debts are not paid by the debtor, then they must usually be borne by the taxpayer in the form of relief to the debtor's needy dependents. If all states would enforce foreign orders for alimony and support, the money saved to the taxpayers of each state would be more than substantial. Finally, this would be a step in the direction of having the states assume full responsibility for matters within their competence. And that in turn would obviate the necessity for federal encroachment upon the powers of the states in these matters.

The trend of state decisions as shown by the dates of the first impression cases discussed above is definitely in this direction. Those dates are: 1927, 1929, 1934, 1935, 1936, 1936, 1940, 1940, 1942, 1944 and 1946. It is respectfully submitted that this trend should be continued and accelerated until it includes every state in the Union.

* * * * *

This Brief is the product of a cooperative effort of many of those associated with Legal Aid work in various communities. The Committee charged with the preparation of this Brief wishes to make special mention of Vincent LoLordo, Esq., of the Staff of the

New York Legal Aid Society for doing the foundation research work on which the Brief is based; Miss Ines DiPersio, of the Staff of the Boston Legal Aid Society; Arthur K. Young, Esq., of the Staff of the Chicago Legal Aid Bureau; Mr. Clarke Murphy, Jr., and Mr. James T. Smith of the Legal Aid Clinic of the University of Maryland for research in preparation of the Brief; and Donald H. Frye, Esq., of the Staff of the Baltimore Legal Aid Bureau, for preparing the first draft of the Brief. To these and all others who have assisted the Committee expresses its sincere appreciation.

COMMITTEE ON LEGAL RESEARCH
AND LEGISLATION

GERALD MONSMAN, *Chairman*
25 Exchange St., Rochester, N. Y.

Editorial Note on The Doctrine of Interstate "Comity" in Massachusetts and its Relation to Non-Support

In connection with the foregoing "Brief" the following is submitted for consideration.

By chapter 237 of the Acts of 1933, a sentence was inserted in section 6 of Gen. Laws Chapter 215 which since 1891 has provided the probate courts as courts of "superior and general jurisdiction" with "jurisdiction in equity", "concurrent with the supreme judicial and superior courts" within their field.

The sentence inserted was,

> "They shall [the courts above mentioned] also have jurisdiction in equity to enforce foreign judgments for support of a wife, or of a wife and minor children against a husband who is a resident or inhabitant of this commonwealth, upon a petition of the wife filed in the county of which the husband is a resident or inhabitant."

This sentence has been held to contemplate the continuance of the marital status and not to extend to the collection of alimony in the probate courts. (*Seltman* v. *Seltman*, 322 Mass. 650).

The "full faith and credit" clause of the Federal constitution was held not to apply to the facts in the alimony case of *Watts* v. *Watts*, 314 Mass. 129. Unless we are mistaken, however, the doctrine of "comity" between states referred to in the brief

printed above, when combined with the general equity jurisdiction in the superior court and, it seems, in the probate courts (see *Connors* v. *Cunard Co.*, 204 Mass. at p. 232 and *Old Colony Tr. Co.* v. *Porter*, 1949 Ad. Sheets at p. 920) is independent of the "full faith and credit" clause and the Massachusetts rule against suits between husband and wife (except in equity). It seems to include the enforcement of family support, especially when no divorce is involved. We have not noticed any discussion of this aspect of the problem in the Massachusetts cases.

The doctrine of "comity" (generally classified now under the head of "conflict of laws") in the enforcement of liabilities transitory in nature, such as contracts made in another state, has been applied in Massachusetts from the beginning. As early as 1806, in *Pearsall* v. *Dwight*, 2 Mass. 84 at pp. 88-89 Chief Justice Parsons said,

> "It is a general rule, that personal contracts entered into, and to be performed in any one state, and which are there valid, are to be considered as valid in every other state.
>
> "This rule is founded on the tacit consent of civilized nations, arising from its general utility, and seems to be a part of the law of nations adopted by the common law.
>
> "To give effect to contracts of this description, is an act of comity due from the courts of the state in which such contracts may be sued to the state in which they may be made.
>
> "This rule is subject to two important exceptions. First, that neither the state in whose court the contract is put in suit, nor its citizens may suffer any inconvenience by giving the contract effect. And secondly, that the consideration of the contract be not immoral, and the giving it effect will not have a bad tendency. Under these exceptions, the cases, which do not come within the rule, may be classed."

He discussed it again in *Greenwood* v. *Curtis*, (6 Mass. 358 at pp. 377 et seq) in which Mr. Justice Sedgewick dissented, not from the general doctrine, but from its particular application because the slave trade was involved in the consideration of the contract (see dissent in footnote p. 363). The doctrine has been recognized repeatedly, by Chief Justice Shaw in *Means* v. *Hapgood*, 19 Pick.

105, by Chief Justice Gray in *Milliken* v. *Pratt*, 125 Mass. 374 and by Chief Justice Rugg in the *Midland Bank Case*, 281 Mass. 303, at p. 317. (See also *Stone* v. *Old Colony Tr. Co.*, 212 Mass. 459 and for other states 15 Corp. Jur. Sec. "Conflict of Laws" 3-4 pp. 833-839).

The marital obligation of support described in *French* v. *McAnarney*, 290 Mass. 544 at p. 546 seems peculiarly within the doctrine, on the grounds both of status and contract as a civil liability, regardless of any statutes for criminal proceedings merely supplemental to one of the most general civil obligations known to the law today. (cf sec. 7 of G.L. chap. 273).[1]

In an article by Prof. Jacobs (6 Law and Contemporary Problems (1939) p. 250 at pp. 272-273, he points out that

> "The problem is not one of "full faith and credit" . . . but whether on the grounds of *comity* adequate protection should be given the wife. It follows that equitable remedies . . . if there are any should be available to the wife. . . . adequate remedies . . . can be provided only through enforcement in a court of equity. . . ."

As early as 1835 the court recognized the protection of a "wife's equity" in her separate property as within even the limited equity jurisdiction at that time (see the opinion of Wilde J. in *Ayer* v. *Ayer*, 16 Pick. 327 and the minority opinion of Field and William Allen J. J. in *Fowle* v. *Torrey*, 135 Mass. 87, (See also 31 M.L.Q. No. 2 p. 47). Special equitable considerations have been recognized ever since as exceptions to the rule against suits between husband and wife in order to prevent injustice. See *Frankel* v. *Frankel*, 173 Mass. 214. The marital obligation to support his wife and children follows a man wherever he goes and because of its nature and of the public interest involved would seem to be peculiarly within the functions of a court of equity as pointed out by Prof. Jacobs.[2]

In view of the scope of the modern conception of equity jurisdiction shown in the leading opinion of *Kenyon* v. *Chicopee*, 320 Mass. 528, is not the protection of the family against a "run-

1. The present statutory character of rights to support described in *Gediman* v. *Cameron*, 306 Mass. 138, does not seem to affect this suggestion.

2. cf *White* v. *White*, 322 Mass. 461 at p. 465.

away husband" also within that jurisdiction on the doctrine of comity without any special statute, especially when no divorce is involved and even where there is a divorce in an alimony case?

Is not the question one of enforcing a recognized liability of which any judgment or support order even if subject to modification is mere evidence? When the marital obligation is established the amount of the support to be enforced would, of course, be subject to reconsideration by the court in which equitable enforcement is sought.

We may be wrong. This view seems to us, however, not only the just view, but within the law as it stands today. We therefore submit it for what it is worth. As to equity jurisdiction of the welfare of infants, see Pomeroy "Equity Jurisprudence" 4th ed. §1304; and 42 Har. Law Rev. 112-115. *Blumenthal* v. *Blumenthal,* 303 Mass. 275 does not seem to conflict as non-support does not seem to be a "debt".

Common Disaster Clauses in Estate Planning

*By Robert H. Wyshak**

Now that the amendments to Regulation 105, interpreting the Revenue Act of 1948, have been promulgated by the Commissioner, estate planners may attempt to measure the ambit of the penumbra of ignorance in which they sit. How much weight may be attributed to the Treasury's construction of the statute is highly conjectural in view of the recent overruling by the *Church*[1] case of *May* v. *Heiner*[2] and the Regulations based thereon. This will be especially true where the Regulations are weighted in favor of the taxpayer, e.g., in their application to common disaster clauses in the wills of decedents. This disquisition concerns the effect on estate planning of those sections of the Regulations pertinent thereto.

Common disaster clauses ordinarily mean that, if a legatee dies from an accident or disaster which also results in the death of the testator, he will not be entitled to receive his bequest. A provision that the legatee must survive the testator for a specific period of time in order to be entitled to receive the bequest is usually called

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* Member of the Massachusetts and California bars.

1. 335 U.S. 632(1949).
2. 281 U.S. 238(1930).

an "early death" clause. The validity of such contingent bequests, providing for a gift over in the event that the subsequent death occurs within the specified time or as the result of a common disaster, has been generally upheld.[3] Use of these provisions not only avoids the expense and delay of double probate proceedings where the clause is invoked, but previously resulted in considerable savings in estate and inheritance taxes. Their importance now has become even greater in view of the elimination of the deduction from the gross estate for property previously taxed as between husband and wife with respect to spouses dying after December 31, 1947.[4]

An additional factor emphasizing the significance of such clauses is that they provide a statutory method for bequeathing property to a spouse without the contingency inherent therein eliminating the right to the marital deduction under the "terminable interest" rule. The phrase "terminable interest" is not actually used in the substantive provisions of the Revenue Act of 1948, but it is a convenient short hand expression for the following lengthy statutory description of an interest passing to the surviving spouse from the decedent which—"upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an

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3. The effect of these clauses is to extend the customary anti-lapse provisions (see *Aiken* v. *Comstock*, 221 Mass. 444(1915); *Bigelow* v. *Clap*, 166 Mass. 88(1896)), of a will to cover the case where the testator and legatee die within a short time of each other or where the order of deaths cannot be determined. There has been a tacit recognition of these clauses by the legislature in adopting the provisions of the Uniform Simultaneous Death Act. See G.L.c. 190A, section 5, *infra*.

A common disaster clause will not prove practical unless it is delimited by defining the maximum interval which may elapse between the deaths of the parties concerned in order to bring them within the provision. It may be advisable to consider whether making benefits contingent on survival of the decree of distribution is not more practical and satisfactory. When this is desired, it should be made clear that the legatee need survive only the making of the decree of distribution and not actual distribution; and further that partial and ratable distributions may be made, since otherwise the provision may be construed as conditioned upon the legatee's surviving the final closing of the estate, an event not infrequently postponed for a considerable period. Where the spouse is the legatee, tax considerations dictate that this contingency be limited to not more than six months after the death of the testator.

4. Int. Rev. Code, sec. 812(c), as amended by section 362 of Revenue Act of 1948.

event or contingency to occur"[5]—will terminate or fail.[6] In substance, Congress was effecting an equalization of the estate taxes as between residents of community property and non-community property states by denying a deduction to the estate of the first spouse to die, unless the surviving spouse received an interest which would be subject to taxation on the latter's death.

The exception carved out of this limitation on the marital deduction by section 812(e) (1) (D) of the Code, provides that an interest will not be considered terminable *merely*[7] because the will provides that death of the surviving spouse will cause the interest to fail if it occurs within a period not exceeding six months after the decedent's death, or if it occurs as a result of a common disaster resulting in the death of both spouses, or if such death occurs in either event, and such subsequent death as described "does not in fact occur". If such death does not occur, the interest can be presently deducted and will be taxed to the estate of the surviving spouse. If it does occur, the interest will not vest and, therefore, does not pass to the spouse, thereby depriving the estate of the testator of the marital deduction.

The problem with which estate planners are faced is the advisability of using such clauses. It is obvious that no generalization can be made; only after a consideration of the factors discussed in the following examples[8] should a decision be reached.[9]

1) Suppose that H has considerable property, whereas W has none. H would be advised by his estate planner that he should

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5. Int. Rev. Code, section 812(e) (1) (B).

6. Examples of interests in property which meet the above description are life estates and leases. If the dower or curtesy interest of a surviving spouse is an interest only for life (as in Mass.), and not a fee, it is a terminable interest. Sen. Rep. No. 1013, 80th Cong., 2nd Sess., Part 2, 9(1948). If, however, the surviving spouse elects to take under the will, the marital deduction is determined by the interest acquired thereby. *Id* at 11.

7. This exception does not operate to qualify an interest otherwise terminable, such as an estate for years.

8. It is assumed in these examples that the estate tax is a material consideration and that the situation is such as to make it important to save tax in the aggregate, considering the deaths of both spouses.

9. Where wills are being drawn for both H and W, a decision often will be for the use of the common disaster clause in W's will and the exclusion of the common disaster clause in H's will.

leave to W enough property to attain the maximum[10] marital deduction, which in and of itself is no easy problem, and to leave the balance of his familial bequests to others. In view of the graduated rates, two taxes, each on one-half of the estate, are less in the aggregate than one tax on the whole.

If a common disaster or early death clause is inserted in H's will and if W should die in such a way as to make the clause operative, H's property would then pass directly to his other legatees, thereby depriving his estate of any marital deduction. The attempt to split the total estate into two taxable halves would then have failed.

On the other hand, if no such clause were used and W died the day after H, H's estate would have a marital deduction and W's estate would be taxed on the one-half of H's estate which passed to her. The saving thereby resulting from having each half of H's estate taxed separately must, of course, be weighed against the additional probate expenses incurred from the inclusion in W's estate of the one-half of H's property.[11]

If H and W died simultaneously or if it could not be determined who died first, a different result might obtain. In the absence of a contrary provision in the will, under G.L.c. 190A (the Massachusetts enactment of the Uniform Simultaneous Death Act) H's property would pass as if W had in fact died first. This would eliminate the marital deduction and all of H's property would be taxed to his estate with no tax on W's estate.

The question then arises as to whether a common disaster clause in H's will would confute the application of chapter 190A, and give H's estate the benefit of a marital deduction. G.L.c. 190A, section 5 provides: "This chapter shall not apply to a will, living trust or deed wherein provision has been made for distribution different from the distribution under this chapter, or to a policy or contract of insurance wherein provision has been made for payment of its proceeds different from such payment under this chap-

10. Where the gifts to W will exceed the maximum marital deduction, it is desirable to have a clause providing for a gift over of the excess in the event of W's death within a short time of the death of H. This will prevent inclusion of the same property in both estates and preclude double taxation thereof.

11. Having H create a revocable inter vivos trust for the benefit of W would go far toward reducing H's probate expenses.

ter." Presumably, a clause stating that if H and W die simultaneously, Chapter 190A shall not apply and one-half of H's property shall go to W as if she died first, would be given effect by a probate court. This one-half would then be taxed to W's estate under section 811(a) of the Code. This does not necessarily mean, however, that H's estate will have the benefit of a marital deduction. Throughout section 812(e), there are references to the interest passing from the decedent to his surviving spouse. It would not be in the realm of fantasy to picture the Commissioner contending that the spouse must in fact survive H. Further support in the statute for such a contention may be found in that section[12] of the Code which exempts common disaster clauses from the terminable interest rule and which states that "such termination or failure does not *in fact* occur." (Emphasis supplied.) Section 81.47e of the new Regulations provides that "The Executor must submit such proof as is necessary to establish the right of the estate to the marital deduction, including any evidence requested by the Commissioner." If the Commissioner, acting under this section, were upheld in his request for evidence, which was not forthcoming, that W did survive, the result would be disastrous: all of H's property would be taxed to his estate and one-half of this same property would be taxed again to W's estate.[13]

The probability of such a result will be influenced by that section[14] of the Regulations providing that "Where the order of deaths of the decedent and his spouse cannot be established by proof, a presumption (whether supplied by local law, the decedent's will, or otherwise) that the decedent was survived by his spouse will be recognized as satisfying requirement (1) only to the extent that it has the effect of giving to such spouse an interest in property includible in her gross estate under section 811." Requirement (1) states that the executor must establish that the decedent was survived by his spouse in order to obtain the marital deduction. Thus, the Commissioner at present interprets the

12. Section 812 (e) (1) (D) (ii).

13. This will be more serious where H's will provides, as is now customary, that that half of H's property bequeathed to W shall bear no part of the burden of estate and inheritance taxes, in order to insure a maximum marital deduction. In such a situation this clause backfires and results in a larger total tax because of the larger amount W receives.

14. U.S. Treas. Reg. 105, section 81.47a(a).

statute in favor of the taxpayer. Reliance thereon by the taxpayer, however, is no protection, since the Commissioner is not bound by estoppel in this regard. Where such situations have cropped up, either as the result of an administrative change in the Regulations by the Commissioner or a judicial interpretation of the statute, the trend has been in favor of the taxpayer who has relied on the Commissioner's Regulations. If this continues, there would appear to be no harm in using a clause in the simultaneous death situation to negate the application of chapter 190A so long as the above section of the Regulations is operative.

2) Suppose that H and W each own considerable property, the amounts of which are approximately equal. Taxwise, they would be advised not to leave their property absolutely to the other, since the total taxes may be thereby increased despite a marital deduction to the estate of the first to die.

If H should decide that W would consume a considerable portion of the property before her death, then an early death clause would be desirable.[15] If it were not used and W should die soon after H, H's estate would be entitled to a marital deduction but the property passing to W would increase her taxable estate. The result would be that W's estate would exceed H's, and the combined tax on both would exceed the combined tax if the estates were more nearly equal.

From the foregoing it is clear that each case must be considered in the light of its particular facts: the life expectancy of the spouses, the relative estates of each, the tendency of each spouse to consume, and many others. Since there no longer is a deduction for property previously taxed as between spouses dying after December 31, 1947, the draftsman should attempt to achieve the tax saving which would otherwise have resulted if the spouses did die prior to that date within five years of each other.

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15. Where the order of deaths cannot be determined, chapter 190A will achieve the same result.

The Action of the American Bar Association in Regard to the "Genocide" Treaty Pending before the Senate of the United States and the Reasons for it.

This treaty is on our doorstep. What shall be done about it?

The full text was printed, with an introductory note in the "Quarterly" for April 1949 (pp. 85-91). Its provisions were discussed by Hon. Orie L. Phillips, of the United States Circuit Court of Appeals for the 10th circuit, in the A.B.A. Journal for August 1949 (p. 623). It was further discussed, at length, in a report to the House of Delegates, by the Special Committee on "Peace and Law Through United Nations" and by the Section on "International and Comparative Law". These reports differed in the resolutions submitted to the House—the committee on Peace and Law being in favor of recommending that the treaty should not be ratified *as submitted* and the other recommending ratification *with reservations*. A special committee of the House appointed to consider these resolutions brought in a third draft. Other discussions relating to the subject, by President Holman, Mr. Moskowitz and Mr. Rix had appeared in the A.B.A. Journal for April and for July and in a special report to the House by President Holman. After a vigorous, and somewhat heated, debate, before a full House, lasting three hours, the House, on September 8, adopted the third resolution, which reads as follows:

Resolution of the House of Delegates of the American Bar Association Adopted September 8, 1949

"Be it resolved, that it is the sense of the American Bar Association that the conscience of America like that of the civilized world revolts against Genocide (mass killing and destruction of peoples); that such acts are contrary to the moral law and are abhorrent to all who have a proper and decent regard for the dignity of human beings, regardless of the national, ethnical, racial, religious or political groups to which they belong; that Genocide as thus understood should have the constant opposition of the government of the United States and of all of its people.

"Be it further resolved, that the suppression and punishment of Genocide under an international convention to which it is proposed the United States shall be a party involves important

constitutional questions; that the proposed convention raises important fundamental questions but does not resolve them in a manner consistent with our form of Government.

"Therefore, be it resolved, that the convention on Genocide now before the United States Senate be not approved as submitted.

"Be it resolved further, that copies of the report of the Special Committee on Peace and Law Through United Nations and the suggested resolutions from the Section of International and Comparative Law be transmitted, together with a copy of this resolution, to the appropriate committees of the United States Senate and House of Representatives."

Press Criticism of the Vote

Various newspapers have severely criticized the action of the House of Delegates. The most extreme comment that has come to our attention being the following from the Boston Traveller of September 10:

A Critical Editorial

"The spectacle of the American Bar Association pitting itself against the United Nations is ludicrous, or would be if there were not such a serious issue involved.

"The genocide pact, worked out with considerable care to meet the objections of all nations, was heralded far and wide as one of the major achievements of the last session of the United Nations Assembly. For a wonder even the USSR signed up.

"Now comes the American Bar Association with a carload of flies to put in the ointment. The ABA is petitioning the U. S. Senate to refuse to ratify the genocide treaty on the ground that it might commit us to an international agreement which would supersede the statutory law of the United States.

"So what, we ask? If we can't afford to risk signing an international agreement to outlaw mass killing because of race or creed, we ought not to consider ourselves eligible to join a civilized society of nations.

"If it does mean giving up some sovereignty we should be glad to do it. If it does require a constitutional amendment, let's

have the amendment later. But at all costs let's not do anything to upset the treaty as it now stands. For the protection of the whole world it is essential that some such pact be on the books, even if it isn't perfect. The ABA action, taken only after bitter struggle on the convention floor, strikes us as shameful."

Other comments appeared in the Springfield Union and the Christian Science Monitor and, doubtless, other papers. As all the Massachusetts delegates then in the House voted for the resolution opposing ratification *as submitted*, the lawyers of Massachusetts, who might have to represent American citizens under the treaty, if it were adopted, should have some information about it. It is obvious that the editorial writers did not understand the questions involved in the treaty as studied by the committees and by members of the House.

One of the Massachusetts delegates, Horace E. Allen of Springfield, former treasurer of the Massachusetts Bar Association, stated his views in the Springfield Union of September 16 as follows:

Horace Allen Explains Why Bar Association Is Against United Nations Proposal

"To the Editor of The Union:

"Sir: Several editorials which have come to my attention on the position of the American Bar Association on the Genocide Convention have failed to set out the argument which led to the vote of the delegates to oppose the Convention. Your editorial of this morning does not set it out.

"It is this. The United States is in a position different from that of the other nations by reason of the provision in our Constitution which reads,

"Article VI.

> " 'Constitution, laws and treaties of the United States to be supreme. 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.'

"This Article, many constitutional authorities believe, will result in making the Genocide Convention if adopted as a treaty supersede all other law on the subject in this country and take away from the states their jurisdiction over all crimes which may in any way be considered to be forbidden by the Genocide Convention. Jurisdiction will be thrown into the Federal Government or if an International Court is established, into the International Court.

"The Genocide Convention goes much further in its definition of the crime of genocide than editorial writers seem to realize. The Convention defines genocide 'as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' The words 'in part' may include any sort of a riot directed toward such a group and among the 'following acts' the Convention sets out not only killing members of the group but also causing bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

"The jurisdiction of the states over all killings and all maimings or even mental harm to its citizens is to be taken away if it is in any way related to an intent to destroy in part one of the groups named. It is very evident that we have here a proposal which goes way beyond the Nazi program against the Jews or the Armenian massacres and other campaigns of a similar nature on the part of a government.

"I very much favor a considerable delegation of our sovereignty to a world state but the argument above outlined does appeal to me to justify a vote with the majoriy of the Bar Association House of Delegates against the Convention. In delegating power to a world court we should not further cut back the control of the states of domestic matters."

HORACE E. ALLEN"

So far as I am aware, none of the lawyers in the House who voted on the matter believed that the treaty should be ratified in its pending form. The extent to which the treaty-making power

can be, or should be, used in such a way as to affect the constitutional structure of our federal and state governments is a very serious question for the American people. The question also arises in connection with the "human rights" "covenant", or treaty, the formulation of which is now under consideration by the State Department and the United Nations and may, perhaps, be submitted to the Senate in the near future.

FRANK W. GRINNELL,
State Delegate for Massachusetts

Notice

We are advised that copies of the report of the Special Committee on "Peace and Law Through United Nations" which was submitted to the House of Delegates at St. Louis will be mailed to all members of the American Bar Association. It deserves reading when received.

We are also advised that on January 5, 1950, in Boston there will be a discussion of the proposed international covenant on human rights, between Carl B. Rix, Esq. of Milwaukee, former president of the American Bar Association and present chairman of the committee on "Peace and Law", and some one representing the views of the State Department, at the dinner of the Law Society of Massachusetts.

Ed.

Constitutional Amendments Proposed Relative to the Supreme Court of the United States

Eligibility of Justices for Political Offices
Number and Retirement of Judges

The Massachusetts bar should be kept informed as to these proposals in the House of Delegates of the American Bar Association because of their obvious nation-wide importance. They were initiated in December 1947 by a vote of the Bar Association of the City of New York urging their support by the American Bar Association. (See A.B.A. Journal for January 1948 p. 1). The Journal for January 1949 (p. 1) contained a discussion by former Justice Roberts supporting them and they have been before the House of Delegates several times on divided reports of different committees. Last February they were all referred to the standing Committee on Jurisprudence and Law Reform,* which reported to the House at the St. Louis meeting in September 1949. They were also discussed at length in an article by the undersigned, in answer to Justice Roberts, in the Journal for August 1949, prior to the St. Louis meeting.

Several amendments were proposed. One relating to the "appellate jurisdiction" has been the subject of continued controversy. It was explained in the "Quarterly" (Vol. XXXIII No. 4, July 1948, p. 50 and No. 5 for December 1948, pp. 94-96). It was debated and defeated at the Seattle meeting in 1948 and again at the St. Louis meeting in September 1949. The committee opposed the change by a majority of 7 to 3.

The proposal, having been twice defeated in the House, is, presumably, quiescent for the present, but if it arises again, as it may, it is to be hoped that the bar generally, will find time to read the article by Justice Roberts in the "Journal" for January 1949 and the answer to it in August, and express their views, as I believe the question to be of great importance to the people of Massachusetts

* The committee (containing a member from each of the ten Federal circuits) consisted of Walter P. Armstrong, Jr., of Tennessee, Chairman; Warren R. Austin, Jr. of Vermont; T. Justin Moore of Virginia; Roy E. Willy of So. Dakota; James A. Woods of Colorado; LeDoux R. Provosty of Louisiana; Robert T. McCracken of Pennsylvania; Telford B. Orbison of Indiana; Walter E. Craig of Arizona; and Frank W. Grinnell of Massachusetts.

and of the Nation as a whole, and should receive more attention from the profession than it has hitherto.

The other proposals were not acted on at the St. Louis meeting. They were referred back to the committee and will probably come up for action at the midwinter meeting of the House in February. The following discussion of them, from the article by the undersigned in the August "Journal" referred to, is printed so that readers may consider them and express their views before February.

Eligibility for Political Office

The committee unanimously recommends that members of the court, hereafter appointed, shall be ineligible for the office of president or vice-president until five years have elapsed after their retirement from active service.* There is some history behind this recommendation which, I think, should be called to the attention of the bar.

Warren in "The Supreme Court in United States History," after a somewhat detailed account of the career of Chief Justice Chase, says (vol. 3, p. 131),

> "Chase retained his ambition to succeed to the Presidency, and he was undoubtedly desirous of receiving the nomination both in 1868 and in 1872. While this ambition never influenced his judicial decisions it seriously impaired the popular confidence in his impartiality and weakened the effect of some of his opinions."

Fairman's "Mr. Justice Miller and the Supreme Court" devoted an entire chapter to the "Presidential Aspirations", not only of Chase, but of Justices Davis and Field openly, and even of Miller, less openly, (see Chap. XIII). Thomas Nast's cartoon (in Harper's Weekly of April 6, 1872) of "The Presidential Fever on the Supreme Bench", is here reproduced showing Chief Justice Chase advising Justice Davis.

In Paine's Life of Thomas Nast, where this cartoon is also reproduced, it appears that Judge Miller approved of this form of popular ridicule of judicial ambitions (see pp. 232-234). Swisher's Life of Stephen J. Field, (chapters XI and XII) contains the story of his ambitions.

Chief Justice Waite in declining said, "In my judgment the

* Advance Program 1949, p. 79.

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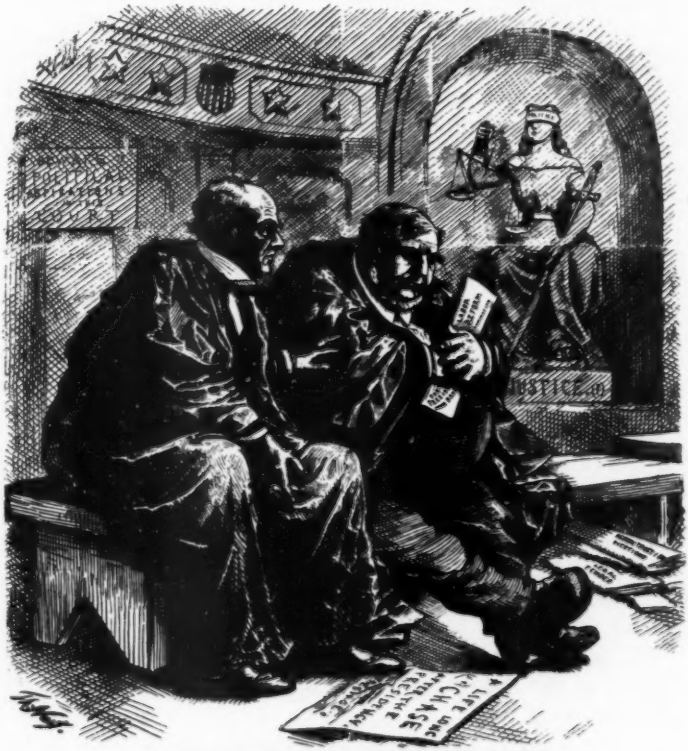

THE PRESIDENTIAL FEVER ON THE SUPREME BENCH.

Chief Justice. "Mark but my fall, and that that ruin'd me.
Judge Davis, I charge thee, fling away ambition,
By that sin fell the angels; how can man, then,
The image of his Maker, hope to win by't?"—*Shakspeare.*

constitution might wisely have prohibited the election of a chief justice to the Presidency." (See Warren, Vol. III, pp. 285-287).

We believe that, in the public interest, it is time to follow the suggestion of Chief Justice Waite and protect the public confidence in the court from the recurrent political aspirations of any of its members.

Number of Justices and the Retirement Age

The committee recommended the following (on p. 78 of the Advance Program),

> "*Resolved,* That it is the sense of the American Bar Association that the Congress should propose and the legislatures of the states should ratify an amendment to the Constitution of the United States of America as follows:
>
> "Section 1. The Supreme Court shall be composed of the Chief Justice of the United States and eight associate justices in regular active service.
>
> "Section 2. The Chief Justice of the United States and each associate justice of the Supreme Court shall cease to be an active member of that court when he shall have attained the age of seventy-five years, but shall continue to be an inactive member of the court and to receive all the emoluments of his office."

Mr. Provosty concurred except as to the final phrase of Section 2 in regard to continuance as an "inactive" member of the court.

Number of Justices

The present statute (sec. 1 of chap. 1 of Title 28 of the Federal Code) provides that "The Supreme Court of the United States shall consist of a chief justice of the United States and eight associate justices any six of whom shall constitute a quorum."

The special committee on the Judiciary recommended that the substance of this statute be elevated to a constitutional amendment in the following form:

> "The Supreme Court shall be composed of the chief justice of the United States and eight associate justices in regular active service."

Chief Justice Hughes said, in his letter to Senator Wheeler in 1937,

"An increase in the number of Justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of (nine) Justices is thought to be large enough so far as the prompt, adequate and efficient conduct of the work of the Court is concerned."

Justice Roberts agrees and referring to this letter says,

"every man who is added to the Court adds another voice in council, and the most difficult work of the Court, as you may well have imagined, is that that is done around the council table; and if you make the Court a convention instead of a small body of experts, you will simply confuse council. It will confuse council within the Court, and will cloud the work of the Court and deteriorate and degenerate it. I have not any doubt about that."

The committee agreed.

Retirement Age

The proposal referred to the committee was that the chief justice, and each associate justice, "shall cease to be a member of that court when he shall have attained the age of seventy-five years."

An amendment already introduced in Congress would compel retirement at seventy. That is the present age for *voluntary* retirement without loss of salary under the statute, but for compulsory retirement it is too early. The great service performed by many men on many courts, as well as in the recent war, by men over seventy illustrates this.

With the increasing rapidity and pressure of life under modern conditions we think the purpose of the proposed general rule of retirement from active service at the age of seventy-five is a wise one. While *automatic* retirement from regular active service at that age, could, perhaps, be provided for by act of Congress without enlarging the court and without affecting the tenure and salary, it may be questioned and, we believe it wiser to couple such a provision with the limitation of the number of justices in a constitutional amendment as one unified plan most likely to

be understood and approved by the people generally, rather than to submit the proposals separately.

The suggested form of the amendment, however, seemed unwise as it would seem to cut out, or, at least, endanger, the retirement allowances of the justices and leave them dependent for the continuance of their compensation on uncertain legislative action.

The committee, therefore, recommended that, on reaching the age of seventy-five the justice shall retain his office, but shall retire from active service substantially as is now provided by statute for voluntary retirement, as Mr. Justice Vandervanter retired, so that a vacancy shall exist to be filled as provided by the constitution. This is provided for in the amendment recommended and quoted above.

Comments will be welcomed by the undersigned before February 1950.

Frank W. Grinnell
State Delegate for Massachusetts

A Plan for the Investigation of Automobile Accidents

*By James B. Muldoon**

The consequences of motor vehicle accidents are well known to members of the bar but it often appears when the storm of controversy has cleared, that one of the parties involved has not been justly dealt with.

One of the chief reasons for this state of affairs is the inability of the court, and in many cases of both attorneys, to get at the real facts. In few cases is the evidence truly complete and only then after long and expensive investigation.

In Massachusetts where liability insurance is compulsory, there is a partial guarantee of protection but experience shows the need for a thorough investigation as close as possible to the time and place where the incident occurred. Such expediency is bound to prevent both fraud and oppression in dealing with the insurance carrier and the other participant.

The reports made at the present time to the police and to the Registry of Motor Vehicles are self-serving statements colored by fear and emotion and showing little if anything which is valuable. In serious cases the police make their own reports but the chief purpose of these is in connection with the criminal aspects of the case.

Most agencies involved work at prevention and only incidentally at investigation. One need not even file a report at the Registry except upon complaint of the other party. With the advent of more automobiles on the road, the need for such investigation increases.

A program which will bring about an immediate investigation of all serious cases will remove an automobile tort from the realm of forensics and conjecture into the light of cold fact.

The Metropolitan Police Department of Washington, D. C., has for some time attempted to investigate every major accident within the District. Special Accident Investigation Units from the Traffic Division are charged with the investigation of accidents involving private and *public* vehicles including street cars.

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* Of the Boston bar.

A letter from Major Robert J. Barrett (Superintendent of Police) to the writer summarizes briefly the work of this unit:—

> "It is desirable to have an Accident Investigation Unit as a part of the Traffic Division, which has for its primary purpose, the proper investigation of accidents. For instance, if there are 1000 accidents a month reported in a city, with about 300 injuries and an average of 6 or 8 deaths, there should be about 35 or 40 officers assigned to this unit. A maximum of 6 cars on the street during most of the day and up to 12 Midnight; a lesser amount 4 or 2 during other parts of the day and night when accidents do not occur so frequently. These cars should be assigned to territories according to the accident experience. Each car should have a camera, tape measures, first aid equipment, blankets, a broom, etc. All the officers of this unit should be carefully selected and receive special training for this type of work."

In action two officers are assigned to each patrol car which is specially marked. The car rushes to the scene (when advised by radio or other means) where the officers render all assistance possible. Regular police patrols stand by until the Investigation Unit can reach the scene. This unit arranges for transport to the hospital and the officers are well trained in first aid.

Traffic is diverted or stopped and a thorough investigation is made of the entire occurrence including measurement, photographs, statements of those involved, statements of witnesses, inspection of the vehicles etc. Criminal actions against the offender are instituted on the report of this unit. Such reports as are made are much more exhaustive than those filed in Massachusetts.

It is not the intention of the writer to urge that the information gathered in this manner should be used as evidence at a trial, but rather that the non-criminal aspects of the investigation should be made available to either party with copies at a nominal sum to cover costs.

Such a program as now is carried out in the District of Columbia should be considered for Massachusetts. It is not immediately apparent how our various enforcement agencies can be integrated in this regard so as to centralize policies, but it is deserving of some study.

Adoption of the Investigation Unit scheme would mean that the individual who was so fortunate as to find himself at, or near, the scene of the accident, or with first access to the witnesses, could not deprive his adversary of an equal opportunity for a fair chance at the facts.

This suggested program has many other features too numerous to mention in a short article, but the writer hopes it will provoke comment and perhaps result in some study and action on the part of the Massachusetts Bar.

A Social Fact of Generally Forgotten Importance

At the suggestion of a brother lawyer, we have, recently, changed our brand of tobacco to a mild "London Old Guard Mixture" supplied by the "B.B.B. Company Ltd."

Our attention was, at once, attracted to the quotation on the cans and packages, said to be "from an Old English Essay", which we respectfully call to the attention of all professors, students, lawyers, judges and others interested in problems of the family and domestic relations generally. We do not remember seeing it in print before. It reads as follows:

> ". . . The fact is Squire, the moment a man takes to a pipe, he becomes a philosopher. It's the poor man's friend; it calms the mind, soothes the temper, makes a man patient under difficulties. It has made more good husbands, kind masters, indulgent fathers, than any other blessed thing on this universal earth. . . ."

Perhaps, some one can identify the source of the quotation.

F.W.G.

Lord Chief Justice Goddard

Those who met Lord Goddard here some years ago will be interested in seeing his genial, humorous face looking at them from the midst of the formal dress of the Lord Chief Justice. While still at the bar, in 1931, he appeared in the Superior Court of Massachusetts, before the late Mr. Justice Wilford Gray, as an expert witness on English law as applied to Soviet law, in the *Midland Bank* case (281 Mass. 303), the essential points of which were promptly grasped by Judge Gray with his habitual ability.

At the hearing on a motion to dismiss on the doctrine of "*forum non conveniens*", some objection having been made to the introduction of affidavits and testimony as to foreign law in a hearing on a motion, Judge Gray is reported to have remarked "I know of nothing to prevent a judge from informing himself as to foreign law in any way he sees fit to do so."

The remark is interesting as it stated the exact purpose of the Massachusetts statute passed a few years earlier as chapter 168 of 1926—the first act passed by the legislature on the recommendation of the Judicial Council,* and, we believe, the broadest act relating to "judicial notice" in any jurisdiction. It consisted of one sentence and now appears as section 70 of the Gen. Laws chap. 233 (Ter. Ed.) as follows:

> "The courts shall take judicial notice of the law of the United States or of any state, territory or dependency thereof *or of a foreign country* whenever the same shall be material."

So Judge Gray listened to Mr. Goddard, K.C.

Rayner Goddard was born in 1877. He was educated in Marlborough School and Trinity College, Oxford. As a barrister he joined the Western circuit at Salisbury in 1899 and on the fiftieth anniversary of that event he opened the Salisbury assizes as Lord Chief Justice in 1849. He was Recorder (a part time judge for criminal business) of Poole from 1917 to 1925, of Bath from 1925-1928 and of Plymouth from 1928-1932. He was a "Bencher" of the Inner Temple and "took silk" as a K.C. in 1923. He was appointed a justice of the King's Bench Division of the High Court of Justice in 1932, a Lord Justice of Appeal and a member

* First Report, reprinted in XI M.L.Q. No. 1 Nov. 1925, pp. 36-39.

"The Rt. Hon. Lord Goddard, Lord Chief Justice of England"

by James Gunn

of the Privy Council in 1938, a Lord of Appeal in Ordinary (a member of the Judicial Committee of the House of Lords) in 1944 and Lord Chief Justice of England in 1946. The office is considered, from a purely professional point of view, the most desirable judicial office in England as it is not subject to change with change in the political administration as is that of Lord Chancellor. He seems a worthy successor in the great tradition begun by Lord Chief Justice Holt, at the beginning of the 18th century, of judges appointed to hold their offices "during good behavior" free from political pressure of the crown.

We understand that the portrait here reproduced was painted for the Inner Temple. The gold chain seen in the picture is known as "the collar of S. S.", which probably stands for "sanctus spiritus"; it is only worn by the Lord Chief Justice, and then only on state occasions, and is handed down from chief to chief.

In England the Lord Chief Justice sits occasionally at the trial of cases, civil or criminal, besides presiding in the Court of Appeal and in the Court of Criminal Appeals. We have already referred to Lord Goddard's presiding at the Salisbury assizes this year. He also presided at the trial of Ley and Smith for murder at the Central Criminal Court, commonly known as "The Old Bailey" in 1947. The case, known as "the chalk pit" murder, is fully reported in the 69th volume of the series of "Notable British Trials" published by William Hodge & Co. Ltd. It is likely to interest those who like trials, or "who done it" stories, and it presents a good example of an English trial before a competent and fair judge who assists the jury in the common law method, unhampered by what we have always regarded as the unconstitutional statutory restrictions, common in America, of which section 81 of chapter 231 of the General Laws of Massachusetts is an example.[1] We have always believed that a charge

1. The constitutional question appears to be still open, see *Beers* v. O'*Brien*, 316 Mass. 532 at p. 536. The constitutional common law function of a judge as part of a jury trial, as well as the limitations of that function, were explained by Chief Justice Hughes in *Quercia* v. *U.S.*, 289 U.S. 468 in his opinion which was reprinted in the "Quarterly", Vol. XX, No. 3, May 1935, pp. 45-48. The subject was also discussed on pp. 42-45 and in the final report of the Judicature Commission (VI M.L." M.L.Q. No. 2, Jan. 1921, pp. 85-89). For the history of the Massachusetts statute and General Butler's story of its passage, without notice or hearing, in the General Statutes of 1860 see XI M.L.Q. No. 2, Jan. 1926, pp. 57-59.

such as that in this case was a part of the constitutional common law function of the court in Massachusetts as in the federal courts and that there are not two kinds of common law on the subject. To deliver such a charge fairly, after a long trial, in such a way as to assist them, while emphasizing the fact that it is their function to decide, is not easy; but Lord Goddard's charge like that of Chief Justice Shaw in the trial of Prof. Webster[2] seems to us a good illustration of how it is done.

The case was one of circumstantial evidence and the defendant Ley presented the unusual picture of a man, sixty-six years old, formerly a solicitor in New South Wales and a member of the Cabinet as minister of justice, and, later, a member of the Australian parliament, being tried for a sordid murder in London.

F.W.G.

2. See 5 Cush. 295 at 301-325, and somewhat more fully reported in the report of the whole case by Bemis.

Reversible Error in Homicide Cases in Massachusetts 1927 - 1949

By James M. Rosenthal of Pittsfield

In Volume 13, No. 5 of the Quarterly (May, 1928) pages 106-120, there appeared an article under the title, "Reversible Error in Homicide Cases in Massachusetts", which covered Massachusetts Reports, Volumes 1-259, inclusive. It was set forth therein that 148 homicide cases appeared in those volumes and that among those cases, there had been thirteen reversals, three in first degree murder cases, one in a murder case in 1807 before murder was classified in two degrees, nine in manslaughter cases, none in second degree murder cases.[1]

In Massachusetts Reports, Vols. 260-322, inclusive, and the unbound Massachusetts Advance Sheets, through 1949 Mass. Adv.

(1) As set forth in note 1 of the previous article there were really only 137 different defendants or sets of defendants before the Court in those 148 cases, as some of the cases appear more than once in the books.

Sh. page 894, covering the years 1927-1949, there have been 63 homicide cases reported.[2] Of these, nine had been found guilty of manslaughter; fourteen of murder in the second degree; three of accessory before the fact to murder in first degree,[3] and thirty-five of murder in the first degree. Two on indictments for murder had been found not guilty by reason of insanity. A list of such cases is appended hereto.

Among the sixty-three cases appearing in the present list, there have been only two reversals, in one case where there was a verdict of guilty of manslaughter; and in one where there was a verdict of not guilty by reason of insanity. There were no reversals where there had been verdicts of guilty of murder either in the first or second degree.

A. In *Commonwealth* v. *Bouvier*, 1944, 316 Mass. 489, there had been an indictment for murder. The defendant was found guilty of manslaughter. The case came before the supreme judicial court on the defendant's appeal with assignment of error. G. L. (Ter. Ed.) C. 278, Sects. 33A-33G. The trial judge had refused to direct a verdict of not guilty of murder in either the first or second degree. In this case where the evidence showed that the discharge

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(2) Among those sixty-three cases, the following cases appear more than once in the books: (a) *Com.* v. *Taylor*, 1928, 263 Mass. 356; *Com.* v. *Taylor*, 1928, 265 Mass. 133; (b) *Com.* v. *Snyder*, 1933, 282 Mass. 401; Herman Snyder, petitioner, 1933, 284 Mass. 367; (c) *Com.* V. *Millen et al*, 1935, 289 Mass. 441; *Com* v. *Millen et al*, 1935, 290 Mass. 406; (d) *Com.* v. *Anthony DiStasio*, 1937, 297 Mass. 347; *Com.* v. *Anthony DiStasio*, 1937, 298 Mass. 562. Also included in the list are the following cases which had appeared in the previous list: (a) *Com.* v. *Sacco*, 1927, 261 Mass. 12, which had already appeared in 255 Mass. 369 and 259 Mass. 128; (b) *Com.* v. *Gedzium*, 1927, 261 Mass. 299, which had already appeared in 259 Mass. 453. The Taylor, Snyder and Millen cases were convictions of murder; the DiStasio case, a conviction of accessory before the fact to murder in the first degree. Excluding the Sacco and Gedzium cases, which were convictions of murder in the first degree, the sixty-three cases above referred to, counting each case only once, even though it appeared more than once in the reports, are made up of thirty first degree murder verdicts; two verdicts of accessory to murder in the first degree; fourteen of murder in the second degree, and nine manslaughter cases; two were found not guilty of murder by reason of insanity; fifty-seven in all. In other words, the 211 homicide cases which have appeared in the reports represent only 194 different defendants or sets of defendants.

(3) By G.L. (Ter. Ed.) Ch. 274, Section 2, it is provided: "Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon."

of a shotgun by the defendant, wife of the deceased, against the head of her husband as he lay asleep in bed, causing his death, was not intentional, but that the gun was discharged when, after kicking aside his clothing on the floor, the defendant hurriedly "grabbed the gun" and bumped into something as she turned to leave the room, and where the evidence did not show that the defendant knew or ought to have known that the gun was loaded, the Court held that a finding was not warranted that the defendant had exercised that wanton or reckless conduct necessary to a conviction of manslaughter. The Court therefore held that the defendant's motion that the judge direct the jury to return a verdict of not guilty of manslaughter should have been granted, and ordered the judgment reversed, the verdict set aside and the case remanded to the Superior Court. In the opinion in this case, the Court said: (p. 495 ". . . . in the instant case, confining ourselves as we must to the evidence bearing on the issue of manslaughter and therefore putting out of the case all evidence tending to show intentional murder, we are of opinion that the jury would not have been warranted in finding that the defendant intentionally discharged the gun. The only theory upon which the crime charged could be manslaughter is that the killing was the unintentional result of wanton or reckless conduct on the part of the defendant." In other words, where the question of guilt of murder in first degree, second degree or manslaughter, has been left to the jury, and the jury brings in a verdict of guilty of manslaughter, that is an implied finding of the jury's disbelief of any evidence that could have required a verdict of guilty of murder in either degree, and therefore in determining whether a verdict of guilty of manslaughter is justified, the Court must put to one side and refuse to consider any such evidence which, if found true, would have required a verdict of guilty of murder in either degree.

B. In *Com.* v. *Curtis*, 1945, 318 Mass. 584, the defendant had been indicted for murder, and the jury returned a verdict of not guilty by reason of insanity. He accordingly was committed to Bridgewater State Hospital under G. L. (Ter. Ed.) Ch. 123, Section 101.[4] The defendant filed a claim of appeal and an assign-

(4) G. L. (Ter. Ed.) Ch. 123, Section 101 provides that "if a person indicted for murder or manslaughter is acquitted by the jury by reason of insanity, the court shall order him to be committed to a state hospital or to the Bridgewater state hospital during his natural life."

ment of errors, one ground of error assigned being the denial of the defendant's motion for a directed verdict of not guilty. In this case the deceased, who lived alone in a sparsely populated section of a small village, was killed by blows on the head by a weapon never found. The body was found by the defendant, the nearest neighbor. There was much blood in the room where the body was found, but none on defendant's clothing. The defendant was acquainted with the habits and affairs of the deceased, was friendly with him and knew that the day before his death, he had $1400 in bills in his possession. The money was not found after the death was reported but none was ever traced to defendant's possession. The defendant was not in particular need of money. There was nothing in the shape of a confession or admission by the defendant who reported certain suspicious circumstances which he said occurred on the day of the murder. He also intimated that certain other persons were involved in the murder. The court, saying that evidence which does not go beyond showing that the defendant had an opportunity to commit the crime is insufficient, held that the material evidence disclosed no basis for the conclusion that the deceased had met death by the act of the defendant. The verdict of not guilty by reason of insanity was set aside, and the order of commitment to Bridgewater was vacated.

It was not until the going into effect of Acts of 1891, Ch. 379, that the superior court was given jurisdiction of the trial of capital cases. The first capital case appearing in the books on which trial was had in the superior court was *Com.* v. *Trefethen,* 1892, 157 Mass. 180.

Taking the period represented by 157-322, Massachusetts Reports and the Massachusetts Advance Sheets through 1949, page 894, a period of about 58 years, we find (counting a case which has appeared in the reports more than once as only one case) 120 homicide cases made up of 67 first degree murder cases (including 2 cases of accessory before the fact to murder in the first degree); 30 second degree murder cases and 21 manslaughter cases[5]; and

(5) In the period covered by 157-229 Mass., there were 63 homicide cases (counting each case only once even though it appeared more than once in the reports) made up of 35 first degree murder cases, 16 second degree and 12 manslaughter cases, with three reversals of first degree murder cases, none in second degree murder cases, and two in manslaughter cases.

two cases where the defendant was found not guilty of murder by reason of insanity. The number of reversals in the first degree murder verdicts is 3 or 4.48 per cent; of second degree murder cases, none; of verdicts of not guilty of murder by reason of insanity, 1, or 50%[6]; a total of 4.04 per cent of reversals in all murder cases; in manslaughter cases 3, or 14.29 per cent; making a total of seven reversals out of the 120 homicide cases or 5.83 per cent

During the same period, the total number of non-homicide criminal cases appearing in the books came to 801 with 163 reversals, representing a total of 20.34 per cent of reversals in non-homicide cases, or over three times the percentage in homicide cases.

It is to be noted that by the enactment of Acts of 1939, Chapter 341, amending G. L. (Ter. Ed.) Ch. 278, Section 33E, the powers of the supreme judicial court in a capital case, were increased by giving it the power to order a new trial "if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require." Up to that time only the judge of the superior court who had heard the case had the right to grant a motion for a new trial and his decision would not be disturbed by the supreme judicial court, in the absence of an abuse of discretion. (*Com.* v. *Sacco*, 1927, 259 Mass. 128, 136).

In construing Acts of 1939, Chapter 341, the Court has said: "That statute opens the facts as well as the law for our consideration. It does not, however, convert this court into a second jury, which must be convinced beyond a reasonable doubt of the guilt of a defendant by reading the reported evidence, without the advantage of seeing and hearing the witnesses. — But the statute of 1939 does give us the power and the duty, exercised by a trial judge upon a motion for a new trial. So far as the weight of the evidence is concerned, it is the right and duty of a trial judge to set aside a verdict "when in his judgment it is so greatly against the weight of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evi-

(6) This is the case of *Com.* v. *Curtis*, 1945, 318 Mass. 589, where a verdict of not guilty by reason of insanity was set aside, on the ground that there was no evidence to find that the defendant committed the killing.

dence, but that it was the produce of bias, misapprehension or prejudice. — "The governing rules of law as to motions for a new trial in capital cases are the same as in civil and in other criminal cases. — For a trial judge, or for this court under the statute of 1939, to grant a new trial on the ground that the verdict was against the weight of the evidence, it must appear that the verdict, if allowed to stand, would work a miscarriage of justice. — It is not enough that the judge or judges, if on the jury, would have felt a reasonable doubt which the jury did not share. However restricted or unfounded may be the propositions of law raised by an appeal in a capital case (and such a case can no longer be brought here upon exceptions, G. L. (Ter. Ed.) c. 278, Sect. 31), when a capital case once gets to this court on appeal, the statute of 1939 now requires us to consider the whole case broadly, to see whether there was any miscarriage of justice. The statute requires us to exercise in capital cases an extraordinary power intimated before though seldom if ever exercised (*Commonwealth* v. *Dascalakis*, 246 Mass. 12, 25; *Carangias* v. *Market Men's Relief Association, Inc.* 293 Mass. 284, 285); and to extend that power to questions of fact as well as those of law." (*Com.* v. *Gricus*, 1944, 317 Mass. 403, 406-407).

The Court has further said: "That statute, however, does not require us to review all questions of evidence and of procedure at the trial to which exceptions have not been duly saved, preserved, and prosecuted in order that we may ascertain whether somewhere some successful objection might have been taken and prosecuted but was not. To construe the statute otherwise would be equivalent to taking capital cases altogether out of operation of c. 278, Sections 33A-33G, although it was plainly intended that those sections should apply to capital cases. It would impose an almost impossible task upon the trial judge. It is still the duty of defendants who wish to preserve the points of law to take seasonable exceptions and to file adequate assignments of error according to the procedure provided for in those sections. This court can order a new trial under Section 33E, as amended only "if satisfied" that because of error of law or of fact the verdict is a miscarriage of justice or where because of newly discovered evidence or for some other reason justice requires a new trial." (*Com.* v. *Bellino*, 1947, 320 Mass. 635, 645-646).

Under this construction, the supreme judicial court has found no capital case where it found itself justified in ordering a new trial, though in the opinions rendered in capital cases there is generally at the end a reference to the 1939 statute in substantially the following form: "We have examined the entire record and all the contentions of the defendant in accordance with the provisions of G. L. (Ter. Ed.) Ch. 278, Section 33E as amended by St. 1939, c. 341, and are satisfied that justice does not require that other than the following entry shall be made. Order denying motions for new trial affirmed. Judgment affirmed."[7]

It is to be noted that this "extraordinary power" of ordering a new trial is bestowed upon the supreme judicial court only in a "capital case". The question soon arose what constituted a "capital case" under this statute. A capital case is one in which the sentence is death. An indictment for murder may set forth that "the jurors further say that the defendant is guilty of murder in the second degree and not in the first degree." (See G. L. (Ter. Ed.) Ch. 277, Section 79). Under such circumstances the sentence if the defendant is found guilty would be life imprisonment and not death, and the charge is not that of a capital crime, (*Com.* v. *Ibrahim*, 1903, 184 Mass. 255, 258) and so the case would not come within the provisions of the statute in question. (*Com.* v. *Capalbo*, 1941, 308 Mass. 376, 385). But what happens when the indictment is for murder, not limiting the alleged offense to murder in the second degree, and the jury brings in a verdict of murder in the second degree, as it may legally do? Is the case still a "capital case" within the terms of the statute granting the supreme judicial court the right to order a new trial for the causes therein set forth? That question was first presented to the court in the cases of *Com.* v. *Goldenberg*, 1943, 315 Mass. 26, in which the court said: (p. 34) "We have assumed in favor of the de-

(7) *Com.* v. *Sheppard*, 1943, 313 Mass. 590, 611. See also *Com.* v. *Brooks*, 1941, 308 Mass. 367; *Com.* v. *Giacomazza*, 1942, 311 Mass. 456, 472-473; *Com.* v. *Goldenberg*, 1943, 315 Mass. 26, 34; *Com.* v. *Venuti*, 1943, 315 Mass. 255, 262; *Com.* v. *Kavalauskas*, 1945, 317 Mass. 453, 460; *Com.* v. *Noxon*, 1946, 319 Mass. 495, 553; *Com.* v. *Moore*, 1948, 323 Mass. 70, 78-79; *Com.* v. *Hall*, 1948, 322 Mass. 523, 530; *Com.* v. *Galvin*, 1948, —— Mass. —— 1948 Adv. Sh. 875, 889; *Com.* v. *White*, —— Mass. —— 1948 Adv. Sh. 1001, 1003; *Com.* v. *McGarty* —— Mass. ——1948 Adv. Sh. 1129, 1134; *Com.* v. *Delle Chiaie* —— Mass. ——1949 Adv. Sh. 83, 87; *Com.* v. *Pike* —— Mass. —— 1949 Adv. Sh. 629, 633.

fendant that this is a capital case within the meaning of G. L. (Ter. Ed.) c. 278, section 33E, as amended by St. 1939, c. 341, although the defendant has been convicted of a lesser crime than one punishable by death. —" The same "assumption" was applied in *Com.* v. *Venuti*, 1943, 315 Mass. 255, 262; *Com.* v. *Kavalauskas*, 1945, 317 Mass. 453, 460; *Com.* v. *Hall*, 1948, 322 Mass. 523, 530; and *Com.* v. *Moore*, 1948, 323 Mass. 70, 78-79 (Mass. Adv. Sh. 1948, 733, 740). But when the case of *Com.* v. *Coggins* —— Mass. —— (Mass. Adv. Sh. 1949, 873), was reached, namely on appeal from denials of motions for new trial after verdict of guilty of murder in the second degree on an indictment for murder which did not limit the crime alleged to murder in the second degree, the Court said, after referring to the five cases just above cited, (pp. 876-877): "after the defendant was convicted of murder in the second degree, the case did not remain a "capital case." The crime charged in the indictment of which the defendant has been found guilty, is not a capital offense. *Green* v. *Commonwealth*, 12 Allen, 155, 173. *Commonwealth* v. *Ibrahim*, 184 Mass. 255, 258. *Commonwealth* v. *Capalbo*, 308 Mass. 376, 385. The defendant has been sentenced to imprisonment for life. As the proceedings before us do not concern the death penalty, we are not required to exercise the "extraordinary power" (see *Commonwealth* v. *Gricus*, 317 Mass. 403, 407) vested in this court by Section 33 E, as amended by St. 1939, c. 341."

The writer submits that the three cases cited as the basis of the Court's decision that once a verdict of guilty of murder in the second degree is found the case ceases to be a capital case, even though the indictment was not limited to murder in the second degree, do not necessarily lay the proper foundation for that decision. As above pointed out, the case of *Com.* v. *Ibrahim*, 184 Mass. 255, and *Commonwealth* v. *Capalbo*, 308 Mass. 376, were on indictments limiting the charge to murder in the second degree. The case of *Green* v. *Commonwealth*, 12 Allen, 155, merely decides that on a plea of guilty to an indictment charging murder, which plea is not limited to guilty of murder in the second degree, the defendant may be sentenced to death.

It should be noted that even though the jury brings in a verdict of guilty of murder in the second degree on an indictment charging murder in the first degree, that the indictment remains in form un-

changed. Unless the supreme judicial court is to be understood as holding that a verdict of guilty of murder in the second degree modifies the indictment into charging only the lesser crime, so that on a retrial, if one were granted, the jury could not on such indictment bring in a verdict of murder in the first degree,[8] then it would seem that the case still remains a "capital case," so far as its consideration by the supreme judicial court is concerned, even after a verdict of guilty in the second degree, for "there is no principle of the common law better settled or more familiar than that which declares that whatever crime is duly set forth in an indictment, of that a party may be convicted." (Bigelow, C. J., in *Green* v. *The Commonwealth*, 1866, 12 Allen, 155, 172).

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(8) See *Palko* v. *Connecticut*, 1937, 302 U.S. 319, where there was a verdict of guilty of murder in the second degree in a Connecticut Court. The State appealed, under a statute allowing such procedure; there was a reversal and on the second trial there was a verdict of guilty in the first degree, and the defendant was sentenced to death. Held: not in violation of the Fourteenth Amendment to the Federal Constitution.

(For appendix listing cases, see pages 54-62, following.)

HOMICIDE CASES: 260 Mass. to Mass. Advance Sheets (1949) p. 894[9]

149. *Com.* v. *Randall*, 1927, 260 Mass. 303	Indicted for manslaughter: Guilty: assignments of errors No error; exceptions overruled.
150. *Com.* v. *Sacco et al*, 1927, *Sacco et al* v. *Com.*, 1927, 261 Mass. 12	Motion for new trial and petition for writ of error (See No. 141 & 147). Motion for new trial denied, exceptions overruled; petition for writ of error denied; exceptions overruled.[10]
151 *Com.* v. *Gedzium*, 1927, 261 Mass. 299	Exceptions arising on denial of motion for new trial, made after rescript in 148 heard by judge other than trial judge. Denial of motion for new trial affirmed.[11]
152. *Com.* v. *Gleason*, 1928, 262 Mass. 185	Indictment for murder: Guilty: Assignment of error. Exceptions overruled.
153. *Com.* v. *Desatnick*, 1928, 262 Mass. 408	Indictment for being accessary before fact to murder in 1st degree. Guilty. Assignment of errors. Exceptions overruled: Judgment on verdict.
154. *Com.* v. *Taylor*, 1928, 263 Mass. 356	Indictment for murder: Guilty; assignment of errors; Exceptions overruled: Judgment on the verdict. See No. 158.

(9) The numbering begins at 149, as the most recent case set forth in the list of homicide cases appearing in Massachusetts Reports, Vol. 1-259, inclusive, (see 13 Mass. Law Quarterly, No. 5, pp. 113-119) was No. 148, namely, *Com.* v. *Gedzium*, 1927, 259 Mass. 453).

(10) No. 141 in the former list was *Com.* v. *Sacco*, 1926, 255 Mass. 369. No. 147 in the former list was *Com.* v. *Sacco*, 1927, 259 Mass. 128.

(11) No. 148 in the former list was *Com.* v. *Gedzium*, 1927, 259 Mass. 453.

155. *Com.* v. *Cero*, 1928, 264 Mass. 264	Indictment for murder: guilty: Motion for new trial: appeal with assignment of errors: Judgment on the verdict.
156. *Com.* v. *Buckley*, 1928, 265 Mass. 114	Indictment for murder: guilty in second degree; appeal with assignment of errors; judgment affirmed.
157. *Com.* v. *Arone*, 1928, 265 Mass. 128	Manslaughter: guilty: appeal with assignment of errors; judgment affirmed.
158. *Com.* v. *Taylor*, 1928, 265 Mass. 133	Same case as 154. Motion for new trial denied; appeal with assignment of error; order denying new trial affirmed. Judgment on the verdict.
159. *Com.* v. *Knowlton*, 1928, 265 Mass. 382	Indictment for murder: Guilty: Appeal with assignment of error: judgment on the verdict.
160. *Com.* v. *Trippi*, 1929, 268 Mass. 227	Indictment for murder: Guilty: appeal with assignment of error: Judgment on the verdict.
161. *Com.* v. *Velleco*, 1930, 272 Mass. 94	Indictment for manslaughter: Guilty: exceptions overruled.
162. *Com.* v. *Soaris*, 1931, 275 Mass. 291	Indictment for murder: Guilty: appeal with assignment of errors: Judgment on the verdict.
163. *Com.* v. *Gallo*, 1931, 275 Mass. 320	Indictment for murder: Guilty: appeal with assignment of errors: Judgment on the verdict.

164. *Com.* v. *Belenski*, 1931, 276 Mass. 35	Indictment for murder: Guilty: appeal, with assignments of error: Judgment on the verdict.
165. *Com.* v. *Snyder*, 1933, 282 Mass. 401 (On writ of certiorari to United States Supreme Court Judgment affirmed by 5 to 4 decision. *Snyder* v. *Com. of Massachusetts*, 1934, 291 U. S. 97 (See #167)	Indictment for murder: Guilty: Appeal with assignment of errors: Judgment on the verdict.
166. *Com.* v. *Chin Kee*, 1933, 283 Mass. 248	Indictment for murder: Guilty: appeal, with assignments of error. Judgment on the verdict.
167. Herman Snyder, petitioner 1933, 284 Mass. 367. Same case as No. 165	Petition to establish exceptions; Petition dismissed.
168. *Com.* v. *Osman*, 1933, 284 Mass. 421	Indictment for murder: Guilty: appeal with assignments of error. Judgment on the verdict.
169. *Com.* v. *Gwizdoski*, 1933, 284 Mass. 578	Indictment for murder: Guilty: in the second degree: appeal with assignment of error. Judgment on the verdict.
170. *Com.* v. *Zelenski*, 1934, 287 Mass. 125	Indictment for murder: Not guilty by reason of insanity. Appeal with assignment of errors. Judgment on the verdict.
171. *Com.* v. *Jones*, 1934, 288 Mass. 150	Indictment for manslaughter. Verdict of Guilty. Appeal, under G. L. (Ter. Ed.) Ch. 278, Sects. 33A-33G. Verdict to stand.

172. *Com.* v. *Wita*, 1934, 288 Mass. 502	Indictment for murder: Guilty in 2nd degree. Appeal: Judgment affirmed.
173. *Com.* v. *Millen et als*, 1935, 289 Mass. 441	Indictment for murder: Guilty: On Appeal, Judgment affirmed.
174. *Com. v. Millen et al*, 1935, 290 Mass. 406	Same as 173. Motion for new trial denied. Appeal, with assignment of error. Judgment affirmed.
175. *Com.* v. *Clark*, 1935, 292 Mass. 409	Indictment for murder: Guilty: Appeal: Judgment affirmed.
176. *Com.* v. *Ventura*, 1936, 294 Mass. 113	Indictment for murder: Guilty in second degree: Appeal with assignments of error: judgment affirmed.
177. *Com.* v. *Frank DiStasio*, 1936, 294 Mass. 273	Indictment for murder: Guilty in first degree: Motion for new trial denied. Appeal with assignment of error. Judgment on the verdict.
178. *Com.* v. *Sherman*, 1936, 294 Mass. 379	Indictment for murder: Guilty in first degree. Appeal with assignments of error. Judgment on the verdict.
179. *Com.* v. *Anthony DiStasio*, 1937, 297 Mass. 347	Indictment for accessory before fact to murder. See case 177. Guilty. Appeal with assignment of error. Judgment on verdict.
180. *Com.* v. *Anthony DiStasio*, 1937, 298 Mass.562	Same case as No. 179. Motion for new trial on sentence of death denied. Appeal with assignment of error. Judgment affirmed.

181. *Com.* v. *Mabey*, 1937, 299 Mass. 96	Indictment for murder: guilty in second degree. Appeal with assignment of error. Judgment affirmed.
182. *Com.* v. *Bartolini*, 1938, 299 Mass. 503	Indictment for murder: guilty in first degree: appeal with assignment of error: Judgment on verdict.
183. *Com.* v. *Simpson*, 1938, 300 Mass. 45	2 Indictments for murder; guilty on each; appeals with assignment of error; judgment on the verdicts.
184. *Com.* v. *Green*, 1939, 302 Mass. 547	Indictment for murder; guilty in first degree. Assignment of error. Judgment affirmed.
185. *Com.* v. *Gordon*, 1940, 307 Mass. 155	Indictment for murder in second degree: Verdict of guilty in second degree. Assignment of errors. Judgment affirmed.
186. *Com.* v. *Brooks*, 1941, 308 Mass. 367	Indictment for murder in first degree. Guilty in first degree. Record on appeal under G. L. (Ter. Ed.) c. 278, Sect. 33E, as amended by Acts of 1939, Ch. 341. Judgment affirmed.
187. *Com.* v. *Capalbo*, 1941, 308 Mass. 376	Indictment for murder in second degree. Guilty. Appeal, with assignment of errors. Judgment affirmed.
188. *Com.* v. *Giocomazza*, 1942, 311 Mass. 456	Indictment for murder. On conviction, appeal with assignment of error. Judgment affirmed.

189. *Com.* v. *Sheppard*, 1943, 313 Mass. 590	Indictment for murder: guilty in the first degree. Appeal with assignments of error. Judgment affirmed.
190. *Com.* v. *Maguire*, 1943, 313 Mass. 669	Indictment for manslaughter. Convicted of manslaughter. Appeal with assignments of error. Judgment affirmed.
191. *Com.* v. *Gray*, 1943, 314 Mass. 96	Indictment for murder: conviction in first degree. Appeal with assignment of error. Judgment affirmed.
192. *Com.* v. *Goldenberg*, 1943, 315 Mass. 26	Indictment for murder. Guilty in second degree. On appeal with assignment of error: Judgment affirmed.
193. *Com.* v. *Venuti*, 1943, 315 Mass. 255	Indictment for murder: Conviction in second degree. Appeal with assignment of error. Judgment affirmed.
194. *Com.* v. *Welansky*, 1944, 316 Mass. 383	Indictment for manslaughter. Finding of guilty. On appeal with assignment of error. Judgment affirmed.
195. *Com.* v. *Bouvier*, 1944, Mass. 489	Indictment for murder of husband. Found guilty of manslaughter. On appeal with assignment of error. G. L. (Ter. Ed.) C. 278, Sects. 33A-G, as amended. Judgment *reversed*. Verdict set aside; case remanded to the Superior Court: Motion for directed verdict of not guilty of manslaughter should have been granted.

196. *Com.* v. *Gricus*, 1944, 317 Mass. 403	Indictment for murder; conviction in first degree. Appeal with assignment of error. Judgment affirmed.
197. *Com.* v. *Kavalaukas*, 1944, 317 Mass. 453	Indictment for murder. Found guilty of murder in the second degree. Appeal with assignment of error. Judgment affirmed.
198. *Com.* v. *Curtis*, 1945, 318 Mass. 584	Indictment for murder: Verdict: *not guilty*, by reason of insanity. On appeal with assignment of error. *Verdict set aside.* "The material evidence discloses no basis for the conclusion that the deceased met death by the act of the defendant."
199. *Com.* v. *Rubin*, 1945, 318 Mass. 587	Indictment for manslaughter. Verdict, guilty. On appeal with assignment of error. Judgment affirmed. No prejudicial error in exclusion of admissible evidence.
200. *Com.* v. *Helen Jones*, 1946, 319 Mass. 228	Indictment for manslaughter. Verdict, Guilty. On appeal with assignment of error. Judgment affirmed.
201. *Com.* v. *John F. Noxon*, 1946, 319 Mass. 495	Indictment for murder. Verdict: guilty in first degree. On appeal with assignment of error. Judgment affirmed. No error.
202. *Com.* v. *Bellino*, 1947, 320 Mass. 635	Indictment for murder, guilty in first degree. Judgment affirmed.
203. *Com.* v. *Hall*, 1948, 322 Mass. 523	Indictment for murder, guilty of murder in second degree. On appeal with assignment of error. Judgment affirmed.

204. *Com.* v. *Moore*, 1948, 323 Mass. 70	Indictment for murder; guilty in second degree. Judgment affirmed.
205. *Com.* v. *Galvin*, 1948, Mass. Adv. Sh. (1948) 875, —— Mass. ——.	Indictment for murder; guilty in first degree: Judgment affirmed.
206. *Com.* v. *White*, 1948, Mass. Adv. Sh. (1948) 1001, —— Mass. ——.	Indictment for murder; guilty of murder in first degree. Judgment affirmed.
207. *Com.* v. *McGarty*, 1948, Mass. Adv. Sh. (1948) 1129, —— Mass. ——.	Indictment for murder; guilty of murder in first degree: Judgment affirmed.
208. *Com.* v. *Chiaie*, 1949, Mass. Adv. Sh. (1949) 83, —— Mass. ——.	Indictment for murder; guilty of murder in first degree. Judgment affirmed.
209. *Com.* v. *Pike*, 1949, Mass. Adv. Sh. (1949), 629, —— Mass. ——.	Indictment for murder; guilty of murder in first degree. Appeal, with assignment of errors. Judgment affirmed.
210. *Com.* v. *Coggins*, 1949, Mass. Adv. Sh. (1949) 873, —— Mass. ——.	Indictment for murder; guilty of murder in second degree. Motions for new trial denied. Appeal under G. L. (Ter. Ed.) Ch. 278, Sect. 33B. Judgment affirmed.
211. *Allen* v. *Commonwealth*, 1949, Mass. Adv. Sh. (1949) 879, —— Mass. ——.	Exceptions to affirmance of judgment by single justice of Supreme Judicial Court on petition for writ of error on sentence (16 years before) on indictment for murder in second degree to life imprisonment. Error alleged; failure to assign counsel to defend him. Exceptions overruled.

The following is a complete list of all homicide cases in which verdicts were reversed by the Supreme Judicial Court through 322 Massachusetts Reports and Massachusetts Advance Sheets (1949) 894.

15. *Com.* v. *Curtis*, 1945, 318 Mass. 584 (not guilty of murder by reason of insanity)
14. *Com.* v. *Bouvier*, 1944, 316 Mass. 489 (manslaughter)
13. *Com.* v. *Madeiros*, 1926, 255 Mass. 304 (1st degree murder)
12. *Com.* v. *Retkovitz*, 1915, 222 Mass. 245 (1st degree murder)
11. *Com.* v. *Tircinski*, 1905, 189 Mass. 257 (manslaughter)
10. *Com.* v. *Crowley*, 1896, 165 Mass. 569 (manslaughter)
9. *Com.* v. *Trefethen*, 1892, 157 Mass. 180 (1st degree murder)
8. *Com.* v. *Barnacle*, 1883, 134 Mass. 215 (manslaughter)
7. *Com.* v. *Hartwell*, 1880, 128 Mass. 415 (manslaughter)
6. *Com.* v. *Tobin*, 1878, 125 Mass. 203 (manslaughter)
5. *Com.* v. *Roberts*, 1871, 108 Mass. 296 (manslaughter)
4. *Com.* v. *Woodward*, 1869, 102 Mass. 155 (manslaughter)
3. *Com.* v. *Cooper*, 1862, 5 Allen 495 (manslaughter)
2. *Com.* v. *Mead*, 1858, 12 Gray 167 (manslaughter)
1. *Com.* v. *Hardy*, 1807, 2 Mass. 303 (murder)

Editorial Note on the Functions of the Court in Murder Cases, under St. 1939 Chapter 341

As the younger members of the bar today are not familiar with the history of the act of 1939 referred to by Mr. Rosenthal, we reprint the discussion of the matter by the Judicial Council in its 3rd report in November 1927 (reprinted in 13 Mass. Law Quarterly for November 1927, p. 40). Chapter 341 of 1939 was in the exact form recommended by the Council and was based on the following discussion, although it was not passed until twelve years later.

Extract from the 3rd Report in 1927

"A single judge of the Superior Court now presides over murder trials and passes not only on questions of law involved in the trial of the indictment, but upon mixed questions of law and fact arising on motions for a new trial. The Supreme Judicial Court on appeal passes only on questions of law. As the verdict on such an indictment involves the issue of life and death, we think the responsibility too great to be thrown upon one man. If he errs in any matter of discretion as distinguished from law, the result is irreparable. Even if he is right, his decisions may be challenged, especially in a time of public excitement and there is no tribunal to establish the fact that he is right. It is vital that our Courts do justice; it is also vital that people know that they do justice.

"While the Supreme Court may determine that, as matter of law, there was no evidence of guilt sufficient to warrant the submission of the case to the jury, yet if there was such evidence it is beyond the power of the Supreme Court to pass upon its weight and to hold that the verdict of the jury was not justified upon the facts.

"It is true that the decisions of the trial judge upon matters of discretion, may be reversed if there has been what is called an 'abuse' of discretion, that is to say if 'no conscientious judge acting intelligently could have honestly taken the view expressed by the trial judge.' (See opinion in *Commonwealth* v. *Sacco*, 259 Mass. 128-136.) It is needless to say that such an abuse will so rarely be found by the Supreme Court to have existed that there is no real appeal from that judicial act.

"It follows that the final decision of many of the most important questions which arise in connection with a murder trial, as in other cases, is committed so far as the courts are concerned to a single judge of the Superior Court. An unjust decision by him upon such a question can be redressed by the governor and council alone, upon an application for a pardon or commutation of the sentence. The power of the executive to intervene in an appropriate case is highly important and should by no means be curtailed. The attempt to evoke its exercise is sure to be made, not infrequently, so long as it can be rightfully urged that important questions in the case have been passed upon only by a single judge. When the appeal to the governor is made, as matters now stand, there are bound to be cases where he will feel it necessary to make a thorough and painstaking investigation, either personally or through selected agents. In England, before the creation of the Court of Criminal Appeal, the Home Secretary, in whom is vested the executive power of clemency, occasionally found it advisable to have murder cases thoroughly investigated and reviewed, in his behalf, by one or more competent persons selected by him.

"Such investigations by the executive, involving as they are apt to do something in the nature of a retrial of the case, are extremely burdensome, and in many ways objectionable. The occasion for them can be reduced to a minimum if we alter the system by which murder trials are presided over by a single judge and the appellate court passes only on questions of law. The necessary alteration can be made either by reverting to the old practice of having the trial of capital cases presided over by two or more judges, or by conferring greater powers and imposing more extended duties upon the Supreme Judicial Court, or by a combination of both these changes. We believe it to be inadvisable to restore the old practice of having more than one judge in murder trials, providing any different plan can be evolved which will be satisfactory. As matters stand it would interfere materially with the other work of the Superior Court if additional judges had to be assigned to murder cases. The practice of having more than one judge in such cases has been discarded practically everywhere, and is not an approved practice today. In our judgment it would be distinctly preferable to have capital

cases tried as at present but to broaden the functions of the Supreme Judicial Court on appeal so that it will pass upon the whole case, and will have power to order a new trial upon any ground if the interests of justice appear to require it. If the trial judge has ruled correctly on all matters of law it will of course be only in very rare instances that the appellate court will find anything in the case to warrant setting aside the verdict. But if that court has the duty of examining the evidence and the facts, and complete power to pass upon *all* the decisions of the trial judge, both at the trial and upon motions for a new trial, whether or not such decisions now rest within the discretion of the judge, it will be seldom indeed that there can be any occasion for a subsequent exhaustive review of the case by the governor.

"The power which we suggest conferring upon the Supreme Judicial Court is the same as that now vested in the Court of Appeals of New York under a recent statute. Section 528 of the Code of Criminal Procedure reads as follows:

" 'When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.' (See Gilbert's Annotated N. Y. Criminal Code, pp. 414-418.)

"In a recent case, *People* v. *Ingraham,* 232 N. Y. 245, the court said:

" 'Upon an appeal from a judgment of murder in the first degree we are called upon to review all the evidence and determine whether it is of such weight and sufficiency as to justify in our opinion the result which has been reached.'

"And in the later case of *People* v. *Guadaguino,* 233 N. Y. 344, the court said:

" 'In a case of murder in the first degree this court may order a new trial if it be satisfied that the verdict is against the weight of evidence or that justice requires a new trial.'

"In England by the Criminal Appeal Act of 1907 and in Scotland by the Criminal Appeal Act of 1926 similar broad powers of review are vested in the appellate court. (See also New Jersey,

Compiled Statutes of 1910, pp. 1262-1263, §§ 136, 137, and Suppl. of 1924, p. 898, 53-137A.)

"The English practice is interesting and important. The statute provides that a person convicted on indictment may appeal to the Court of Criminal Appeal, as of right, on any ground which involves a question of law alone and that with the leave of the appellate court or upon the certificate of the trial judge may appeal on any ground which involves a question of fact or on any other ground which appears to the court to be sufficient. The statute then provides:

" 'The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

" 'Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.'

"In Appendix A we reprint for convenient reference the account of the Court of Criminal Appeal which was given by Lord Hewart, the Lord Chief Justice of England, in an address delivered before the Canadian Bar Association on August 24, 1927."

ACT RECOMMENDED BY THE JUDICIAL COUNCIL IN 1927 AND PASSED, IN 1939, AS CHAPTER 341 OF THAT YEAR.

"SECTION 1. Section thirty-three E of chapter two hundred and seventy-eight of the General Laws, inserted by section one of chapter two hundred and seventy-nine of the acts of nineteen hundred and twenty-five and amended by section four of chapter three hundred and twenty-nine of the acts of nineteen hundred and twenty-six, is hereby further amended by adding at the end thereof the words:—In a capital case the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence, and the court may order a new trial if satisfied that the verdict was against the law

or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If a motion is so remitted, or if any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court."

The Judicial Use of Word "Extraordinary"

In the quotations from cases under the act of 1939, in Mr. Rosenthal's article the words "extraordinary power" are applied to the function of the court under that statute. We have always wondered why judges and lawyers, and even authors of standard books like High on "Extraordinary Remedies", are so fond of the adjective "extraordinary". It reminds us of the remark of the late Prof. Maitland that "the word 'quasi' was the only Latin word that the English bar really loved." Except that prerogative writs or the ordinary injunction or other procedural methods are not called for as often as a summons in an action of tort or contract, there seems nothing "extraordinary" in any legal sense about any of them. They are simply the proper methods of proceeding under certain circumstances. We believe the use of the dramatic adjective tends to confusion of thought and misunderstanding of procedure. As indicated in the discussion quoted from the report of the Judicial Council, the act of 1939 provides for no "extraordinary" practice. It was common practice in New York, in New Jersey and in the English Court of Criminal Appeal long before the Judicial Council recommended it for Massachusetts.

The discussion of the statute in *Com.* v. *Gricus*, 317 Mass. 403 at p. 406 seems to us to describe nothing "extraordinary", although that adjective is used on page 407. The statute simply gives the court the authority to do what, in their opinion, and in the words of the statute, "justice may require". F.W.G.

Hall, Massachusetts Law of Landlord and Tenant Fourth Edition Revised, Adams and Wadsworth

Little, Brown and Company 1949

In 1899 Prescott F. Hall wrote the first edition of *Massachusetts Law of Landlord and Tenant.* In the preface* Hall noted that the reports of Massachusetts are peculiarly rich in decisions upon questions of landlord and tenant law and that, therefore, a more complete treatment was possible in a local book upon this subject than is the case with many other branches of the law.

The first edition was followed by a second edition in 1908, a third edition in 1922, and now we are indebted to Adams and Wadsworth for the fourth edition published this year.

The authors have adhered faithfully to Hall's original plan. The new edition is a very welcome successor to the previous editions since, as the authors state, there have been many new cases and statutes although the law, except in a few instances, has not been radically changed. The authors state they have not made any substantial alterations in the general plan of the book except to rewrite and rearrange the Liability sections, add a new Bankruptcy section, and arrange the forms on a different plan. Although they make no mention of it, the reader will be pleased with the larger type and the more attractive format, which make for easier reading and reference to the contents.

In a sense, the book is a digest of the Massachusetts law on landlord and tenant and therefore it is generally sought for a

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* Younger members of the bar may like to be reminded of that preface in which he stated that he attempted to do four things. First. To summarize the law of Massachusetts as to landlord and tenant in such detail as to furnish a complete index to the decisions. Second. To state that law as far as possible in the language of the court itself. Third. To state the facts and to quote from the opinions in the various cases with such fulness that a tedious comparison of the cases themselves may be often dispensed with by the reader. Fourth. To give not only the substantive law, but matters of pleading, practice and evidence, together with forms and practical suggestions. He noted that great pains were taken to give the sources of all statutes cited and to make the statutory citations complete, that some reference would be made to decisions of other jurisdictions and that some topics not strictly belonging to the law of landlord and tenant would be incorporated, such as the statutory lien of boarding-house keepers.

quick answer to a particular question. Hence the rearrangement of Chapter V is in the interest of expediency and will be found very helpful. This chapter is for the first time divided into four topics entitled respectively, Tort Liability in Common Areas, Implied Covenants, Repairs and Fixtures. This ought to save some time for the busy practitioner and it represents an improvement over the previous edition.

The Bankruptcy section is entirely new. It should prove very valuable not alone in negotiating leases, but also in advising clients of their rights either before or after bankruptcy in the event of a default on the part of the tenant. It is not a long section, and a complete reading is recommended to get a good general picture of the subject. The authors suggest a form of termination clause if the landlord desires that a bankruptcy, etc. should constitute a breach of the lease and cause the lease to come to an end *ipso facto*, and an alternative clause in the usual form providing that in the event of bankruptcy, etc., the landlord may enter and terminate the lease. The authors do not refer to the custom which now obtains in many law offices to put both clauses in the same lease although these clauses seem to be inconsistent with each other. Perhaps some discussion of the foregoing would have been helpful. There would appear to be only one situation in which the *ipso facto* clause may be helpful and that in the case of an assignment for the benefit of creditors wherein it is provided that only such claims shall be provable as are provable under the insolvency laws of the Commonwealth. Many assignments, of course, do actually provide that only such claims shall be provable as are provable under the insolvency laws of the Commonwealth. If the assignment should so provide, it is doubtful if the landlord could prove a claim for future damages with respect to a lease which does not contain the *ipso facto* clause unless the lease were terminated prior to the date of assignment (*Cotting* v. *Hooper, Lewis & Co., Inc., 220 Mass. 273*). This raises some question as to the accuracy of the statement in the last sentence of this chapter in which the authors say that

> "If the lessor assents to the general assignment he will share in the assigned assets ratably with other creditors who have likewise assented and there appears to be no

> reason why his claim for damages based on future rent should not be provable in full as in the case of receivership."

It is true that the forms have been arranged on a different plan and instead of numerous forms of various types of leases, there has been prepared what might be called a master form, with alternative clauses to cover different situations. Candidly, the master form is a disappointment. Just as it is true that the reports of Massachusetts are peculiarly rich in decisions upon questions of landlord and tenant law, so it is equally true that the files of Massachusetts lawyers, and certainly those of our good friends who helped the authors in connection with the use of their forms of leases, are likewise rich in forms of lease which resulted from negotiations between landlords and tenants covering a multitude of the situations which must be negotiated in drafting a lease. Practical considerations may have prompted the authors to include only one master form, but nevertheless, it still represents in great measure the so-called "Boston lease" which runs overwhelmingly in favor of the landlord. It is certain that a responsible tenant would not invest a substantial amount in fixtures if it were compelled to accept the seventh paragraph (p. 366) relating to fire and eminent domain. The form does not represent that type of lease which would result from negotiations between a landlord and a tenant equally situated economically. Perhaps it would have been better to have provided no form at all, particularly since the stationers carry a substantial inventory of lease forms of one kind or another.

Another thought occurs here. There is hardly an aspect of the law of landlord and tenant which does not, in the light of high income taxes which prevail today, raise a question of how to obtain the best result taxwise. Perhaps the authors thought it not practical to attempt any discussion of how income taxes affect leases. But nevertheless, a word of caution here and there would have been very helpful. The form of a deposit for security as rent illustrates one problem. If handled one way, the landlord may be required at once to include in his income the amount of the deposit as advance rent; if handled another way, he will not be required to include in his income a deposit for security as rent until applied in case of default. A lease which gives the Tenant a right to apply rents already paid in reduction of the purchase

price of the property demised under the lease and purchased pursuant to an option or agreement contained in the lease may produce a result which is not intended taxwise so far as the landlord is concerned, and also so far as the tenant is concerned. The right to take depreciation may be affected by some provision in the lease. The sale and lease-back devices have become quite common, and they afford interesting opportunities taxwise. Perhaps we can hope for some treatment of the subject of income taxes in the next edition purely on a reference basis.

There is a Pocket Supplement which is now devoted entirely to Federal rent control and related matter. The authors tell us that due to the transitory nature of this subject it was decided to provide coverage in the Pocket Supplement which can be easily revised as the circumstances may require. We hope that they will find merit in the suggestion that the Pocket Supplement is likewise a handy implement in keeping the book up to date without waiting for another edition.

The usefulness of the book to busy practising lawyers has been considerably improved, not alone because of the addition of cases and statutes which have accumulated since the third edition, but also because of the resourcefulness and labor of the authors in their rearrangement of the various matters covered in the books. Thanks to Adams and Wadsworth, *Hall on Massachusetts Law of Landlord and Tenant* continues to be the Massachusetts "bible" on the subject.

David H. Greenberg

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